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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, PERCY GREEN, ROBERT MCPHERSON
and
ROBERT E. PIPER, JR., FRANK E. BROWN, JR.,
BOBBY STROMILE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Roadway Express, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*) is reported at 599 F.2d 1378 (5th Cir. 1979). The amended judgment of the District Court is reproduced in

Appendix B, *infra*, and the District Court's unreported opinion on rehearing is reproduced in Appendix C, *infra*. The opinion of the District Court (Appendix D, *infra*) is reported at 73 F.R.D. 411 (W.D. La. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether attorneys who unreasonably and vexatiously multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 may be personally assessed, pursuant to 28 U.S.C. § 1927, with attorneys' fees as part of the "excess costs" incurred by an opposing party as a result of such conduct?

STATUTES INVOLVED

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 1988 provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

A. Facts

On June 3, 1975, attorneys Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile filed a class action on behalf of three individuals against Roadway Express, Inc., the International Brotherhood of Teamsters and Teamsters Local No. 194. The complaint alleged violations of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The jurisdiction of the District Court was invoked under section 706(f)(3) of Title VII, 42 U.S.C. § 2000e-5(f)(3), and 28 U.S.C. § 1343. During the course of the litigation, attorneys Piper, Brown and Stromile intentionally engaged in conduct which substantially multiplied the proceedings before the District Court, and which ultimately caused the dismissal of the plaintiffs' claims.

B. The Decision of the District Court

After an evidentiary hearing on Roadway's motion for costs, including attorneys' fees, the District Court denied Roadway its costs against the individual plaintiffs (App. B, pp. 9a-10a) but found that attorneys Piper, Brown and Stromile had unreasonably and vexatiously multiplied the proceedings, and thereby "escalated defendants' costs substantially." (App. D, p. 19a) A portion of Roadway's costs, including attorneys' fees, were assessed personally against the three attorneys pursuant to 28 U.S.C. § 1927. The District Court viewed section 1927 as contemplating "an equitable shifting of responsibility for unreasonable and vexatious costs from a party to his counsel." (App. D, p. 24a) Attorneys' fees were included in the award under the additional authority of section 706(k) of Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1988.

C. The Decision of the Court of Appeals

A panel of the Court of Appeals agreed with the District Court that attorneys Piper, Brown and Stromile "are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings" (App. A, p. 5a) but concluded that an award of "costs" under section 1927 may not include attorneys' fees, notwithstanding that section 706(k) of Title VII and 42 U.S.C. § 1988 allow attorneys' fees "as part of the costs."

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With the Decisions of Other Courts of Appeals As to the Proper Construction of 28 U.S.C. § 1927.

As recognized by the Court of Appeals below, a clear division of authority exists concerning "the correct construction of § 1927 and the scope of allowable costs under the statute." (App. A, p. 5a) In *Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1087-89 (2d Cir. 1977), the Second Circuit held that attorneys' fees may be assessed as "costs" under section 1927. The District of Columbia Circuit also has recognized the availability of such an award, *Asai v. Castillo*, 593 F.2d 1222, 1224-25 (D.C. Cir. 1979), and, contrary to the opinion of the Court of Appeals below (App. A, p. 6a), in *Bonsukan v. United States Immigration & Naturalization Serv.*, 554 F.2d 2, 4 (1st Cir.), *cert. denied*, 434 U.S. 833 (1977), the First Circuit intimated a similar view of section 1927.

The Sixth Circuit, in *United States v. Ross*, 535 F.2d 346, 350-51 (6th Cir. 1976), indicated that attorneys' fees may not be assessed under the statute, and the Seventh Circuit, in *1507 Corp. v. Henderson*, 447 F.2d 540, 542 (7th Cir. 1971), specifically held that attorneys' fees may not be awarded under section 1927. In short, the courts of appeals are in direct and irreconcilable conflict.[1]

B. The Court of Appeals Has Decided An Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Although the statute was originally enacted in 1813, the proper construction and scope of an award under section 1927 never has been addressed by this Court. Petitioner respectfully submits that the issues presented in this case involve critical questions of federal law which must not be left in the conflicting state presently existing in the courts of appeals.

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[1] The Court of Customs and Patent Appeals has suggested that attorneys' fees could be "indirectly" assessed under § 1927. Meitzner v. Mindick, 549 F.2d 775, 784 & n.12 (C.C.P.A.), *cert. denied*, 434 U.S. 854 (1977). The Fourth Circuit is currently faced with the issue. Wheeler v. Anchor Continental Inc., 20 Fair Empl. Proc. Cas. 591(D.S.C. 1978), *appeal docketed*, No. 79-1116 (4th Cir. Feb. 14, 1979). *See also* App. A, pp. 5a-6a (citing conflicting district court decisions).

The parties are not always culpable participants in frivolous, unreasonable and vexatious litigation. At some point along the continuum of equity and fundamental fairness, a line must be drawn between attorney and client misconduct, and their respective responsibilities for the oppressive costs visited upon an opposing party because of such conduct. Section 1927 draws such a line.

In holding that section 1927 does not permit attorneys' fees to be assessed against lawyers liable for "costs" under the statute, the Court of Appeals ignored both the clear intent of Congress in Title VII and 42 U.S.C. § 1988 to include attorneys' fees as costs in certain actions,[2] and the effects of insulating irresponsible lawyers from meaningful accountability for their conduct. Indeed, the Court of Appeals' construction of section 1927 effectively restricts attorneys' fees liability to blameless individual parties who oftimes can least afford such liability, particularly in fair employment practice cases. "Fee shifting," a concept firmly established in this Court, *e.g.*, *Hall v. Cole*, 412 U.S. 1, 4 (1973), is warranted in this case both by the applicable statutes and the sound administration of justice. The decision below is incorrect as a matter of law and unjust as a matter of public policy.

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[2] *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 & n.33 (1975) (noting that Title VII's § 706(k) is one of numerous, though exceptional, statutes which "make specific and explicit provisions for the allowance of attorneys' fees").

CONCLUSION

Therefore, petitioner respectfully requests that this Court grant this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT.

J. D. MONK et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC., et al.,
Defendants-Appellees,

ROBERT E. PIPER, JR., et al.,
Movants-Appellants.

No. 77-2067

Aug. 3, 1979.

Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

In this case we examine the propriety of assessing attorneys' fees under 28 U.S.C. § 1927 and 42 U.S.C. §§ 1988, 2000e-5(k)[1] against the plaintiffs' attorneys in a

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[1] 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

(*footnote continues*)

Title VII case. Finding that the three statutes relied on by the district court do not support the assessment of attorneys' fees against attorneys, we vacate that portion of the district court's judgment which awards attorneys' fees to the defendants at the plaintiffs' attorneys' expense, and we remand to the district court for modification of the judgment to reflect only the excess costs caused by the plaintiffs' attorneys' conduct.

On June 3, 1975, J. D. Monk, Percy Green, and Robert McPherson, individually and on behalf of others similarly situated, filed suit against Roadway Express, Inc. (Roadway) and Local Union No. 194 of the International Brotherhood of Teamsters for racial discrimination. The plaintiffs were represented by Robert C. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile, the appellants in the instant case.

On September 5, 1975, the plaintiffs commenced discovery by propounding interrogatories to Roadway. Roadway's motion for enlargement of time within which to answer interrogatories was filed and granted on

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(*footnote continued*)

42 U.S.C. § 1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5(k) provides:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

November 14, 1975. On January 5, 1976, Roadway answered the plaintiffs' interrogatories and simultaneously propounded interrogatories to the plaintiffs. Roadway filed a motion on April 13, 1976, for an order compelling the plaintiffs to answer their interrogatories. A hearing on the motion was scheduled for 10:00 a.m. on April 22, 1976, but the plaintiffs' attorneys failed to appear, requiring the hearing to be rescheduled for 3:00 p.m. on the same day. Following the hearing, the magistrate ordered the plaintiffs to answer the interrogatories on or before May 24, 1976.

At the same time that it had filed a motion to compel, Roadway had noticed depositions of each of the plaintiffs to be taken on May 6 and 7, 1976. The depositions of Monk and Green were taken, but McPherson could not be located by his attorney and his deposition was not taken.

The plaintiffs' lack of cooperation in the defendants' pretrial discovery efforts led Roadway to file two motions to dismiss. On May 18, 1976, Roadway moved to dismiss McPherson's complaint for failure to give his deposition, and on June 14, 1976, Roadway moved to dismiss the complaint of the plaintiffs, with prejudice, for failure to answer interrogatories. On June 16, 1976, the district court ordered the plaintiffs to show cause why their complaint should not be dismissed, with prejudice, and why they should not be taxed with all of the defendants' reasonable expenses, costs, and attorneys' fees. Pursuant to a hearing on the order, the district court dismissed the case without prejudice on June 30, 1976, but retained jurisdiction to determine whether the defendants were entitled to an award of expenses, costs, and attorneys' fees.

On October 5, 1976, the district court held an evidentiary hearing on the imposition of sanctions and/or the taxation of costs and attorneys' fees against the plaintiffs and their counsel. On January 6, 1977, the district court ordered certain costs, attorneys' fees, and expenses taxed

against the plaintiffs' attorneys on the grounds that their conduct was deliberate and vexatious in that they failed to diligently pursue the plaintiffs' interests and abide by the Federal Rules of Civil Procedure. The court found that the forced dismissal of the plaintiffs' claims was caused by the total and deliberate failure of their counsel to properly prosecute them, as evidenced by their failure to answer Roadway's interrogatories as ordered; their failure to produce McPherson for his deposition as previously agreed; their failure to advise their clients of their denomination as class representatives and the possible consequences of class representation; and their failure to file briefs twice requested by the court concerning this case's relation to a class action certification entered in the Western District of Texas. A motion for a rehearing on the motion to assess attorneys' fees and costs against the plaintiffs' attorneys was filed and denied. The plaintiffs' attorneys, Piper, Brown, and Stromile, appeal from the judgment against them in the amount of $17,372.53 for the attorneys' fees and costs incurred by Roadway in defending the law suit.

The appellants contend first that the district court erroneously assessed attorneys' fees against them under 28 U.S.C. § 1927 and 42 U.S.C. §§ 1988, 2000e-5(k), since § 1927 refers only to "excess costs" and §§ 1988 and 2000e-5(k) are applicable only to parties. They next contend that their conduct was not vexatious so that no award of costs under § 1927 should have been entered against them.

Looking first to the propriety of entering any award at all against the appellants under § 1927, we find that the district court's determinations regarding the vexatiousness of the appellants' behavior are not clearly erroneous. *See United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950); Fed.R.Civ.P. 52(a). The instances of misconduct related in the district court's ruling on the motion to assess costs and attorneys' fees adequately support the court's find-

ings of fact concerning the vexatious manner in which the appellants conducted the law suit. Thus, under § 1927, the appellants are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings. Having determined that the appellants are liable for an award under § 1927, we turn to the proper scope of their liability.

The general American rule is that attorneys' fees are not ordinarily recoverable as costs. *E.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391, 90 S.Ct. 616, 24 L.Ed.2d 593 (1969). Section 1927's reference to "costs" neither specifically includes nor specifically excludes attorneys' fees as allowable costs under the statute. Our research reveals a split among circuits concerning the correct construction of § 1927 and the scope of allowable costs under the statute.

The Second Circuit indicated clearly in *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F.2d 1078, 1087-89 (2d Cir. 1977), that, where an attorney has been vexatious in increasing costs through improper motions, actions, or delays, he may be assessed, under § 1927, the "expenses, costs, and attorneys' fees reasonably incurred by the opposing party or parties in meeting such improper motions, action, or delays." Although the District of Columbia Circuit did not address the question as directly as did the Second Circuit, a recent case from the District of Columbia Circuit suggests that that circuit would rule similarly were it faced with a case where the attorney had acted vexatiously. *See Asai v. Castillo*, ____ U.S.App.D.C. ____, 593 F.2d 1222 (1979). In addition, several cases at the district court level have allowed attorneys' fees as part of a § 1927 award against an attorney. *Nemeroff v. Abelson*, 469 F.Supp. 630 (S.D.N.Y. 1979); *North American Foreign Trading Corp. v. Zale Corp.*, ____F.Supp.____ (S.D.N.Y. 1979); *Wheeler v. Anchor*

Continental, Inc., 19 Empl.Prac.Dec. (CCH) ¶9006 (D.S.C. 1978); *In re Complaint of Cosmopolitan Shipping Co.*, F.Supp. (slip op. issued 12-26-78) (S.D.N.Y. 1978).

On the otherhand, the Sixth Circuit, in *United States v. Ross*, 535 F.2d 346, 350-51 (6th Cir. 1976), concluded that the "costs" provided by § 1927 should be limited to taxable costs, recognizing in the course of that determination that attorneys' fees cannot be part of those costs. The Seventh Circuit had reached the same conclusion earlier in *1507 Corp. v. Henderson*, 447 F.2d 540, 542 (7th Cir. 1971). Three district courts, two of which are in this circuit, have since followed suit. *See Yarborough v. Texas Oklahoma Express, Inc.*, 86 Lab.Cas. (CCH) ¶11,256 (N.D. Tex. 1979); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 78 F.R.D. 192 (E.D. La. 1978); *Chrysler Corp. v. Lakeshore Commercial Finance Corp.*, 389 F.Supp. 1216 (E.D. Wis. 1975), *aff'd*, 549 F.2d 804 (7th Cir. 1977). In addition, the First Circuit, while not having clearly addressed the issue, suggests that attorneys' fees are not allowable in a § 1927 award, *see Bonsukan v. Immigration and Naturalization Service*, 554 F.2d 2, 4 (1st Cir.), *cert. denied*, 434 U.S. 833, 98 S.Ct. 118, 54 L.Ed.2d 93 (1977), and a fourth district court reaches the same result in construing similar statutory provisions for awards of costs, *see Lockett v. Hellenic Sea Transports Ltd.*, 60 F.R.D. 469 (E.D. Pa. 1973).

We agree with the Sixth Circuit in its observations that § 1927 should be strictly construed because it is penal in nature. *United States v. Ross*, 535 F.2d at 350. To read § 1927's provision for "costs" as including an award of attorneys' fees "would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction," as the Supreme Court was urged to do in construing the provision for "costs" in § 35 of the Lanham Act. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d

475 (1967). The Court's observations in that case bear repeating in our endeavor to devine the Congressional intent underlying § 1927's provision for the assessment of costs against attorneys. "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Id.* at 720, 87 S.Ct. at 1408. Since "attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor," *id.* at 717, 87 S.Ct. at 1407, and since § 1927's provision for assessment of costs against attorneys is an extraordinary remedy, we conclude, as did the Supreme Court with regard to § 35 of the Lanham Act, that "[a] judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context," *id.* at 721, 87 S.Ct. at 1409.[2] We thus hold that the district court's inclusion of attorneys' fees in the award of costs, pursuant to § 1927, against the appellants was erroneous, and we vacate that portion of the judgment.

Our construction of § 1927 does not foreclose assessment of attorneys' fees against attorneys in every conceivable situation, it merely forecloses the imposition of such liability under § 1927. Moreover, new legislation

[2] We acknowledge that a panel of this circuit affirmed the assessment of jury expenses under § 1927 in *Harrell v. Joffrion*, 73 F.R.D. 267, 268 (W.D. La.), *aff'd without opinion*, 545 F.2d 167 (5th Cir. 1976). We point out, however, that the judgment in *Harrell v. Joffrion* was affirmed pursuant to Local Rule 21. Under that rule, the panel to whom the case is submitted must determine that an opinion in the case would have no precedential value before the rule is triggered. Given that fact, in conjuction with the fact that the basis for a Rule 21 affirmance is never subjected to the scrutiny of the entire court as are published opinions which are circulated among the court prior to their release, we are doubtful that a district court opinion affirmed without opinion pursuant to Rule 21 is Fifth Circuit authority to which we are bound in our ensuing opinions. Even if we were bound by *Harrell v. Joffrion*, we would decline to expand § 1927 further to include attorneys' fees.

specifically providing for such assessments can, of course, be enacted at Congress' will.

We note that the district court's reliance on 42 U.S.C. §§ 1988 and 2000e-5(k) in assessing attorneys' fees against the appellants does not alter the result in this case. Those sections provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless in allowing awards against unsuccessful *plaintiffs*. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); *Little v. Southern Electric Steel Co.*, 595 F.2d 998 (5th Cir. 1979). Nothing in the language of those statutes and nothing in the cases cited to us by the appellees leads us to believe that §§ 1988 and 2000e-5(k) authorize the imposition of attorneys' fees against an unsuccessful party's attorneys. Neither could the district court combine the provisions of those statutes with those of § 1927 to produce a hybrid result contemplated by none of the statutes.

In conclusion, we vacate the judgment of the district court and remand for determination of a proper award consistent with this opinion. We point out in closing that § 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.

VACATED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION
CIVIL ACTION

NUMBER: 750548

J. D. MONK, PERCY GREEN and ROBERT MCPHERSON
v.
ROADWAY EXPRESS, INC. AND LOCAL UNION NO. 194
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Amended Judgment

This cause came on to be heard on defendant's motion for assessment of costs, attorney's fees and expenses, and the Court having heard the evidence and considered briefs of counsel, and pursuant to the written opinions of the Court dated January 6, 1977 and April 13, 1977; a judgment was rendered on May 5, 1977 and that judgment is amended to read as follows:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Roadway Express and against Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile, in the amount of Seventeen Thousand Three Hundred Seventy-Two and 53/100 Dollars ($17,372.53) together with legal interest thereon from date of judgment until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the claim for Five Thousand and No/100 Dollars ($5,000.00) of expenses incurred by Daniel E. Gunn, Vice-President of Roadway Express, Inc. is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion for assessment of costs, attorney's fees and expenses against the plaintiffs, J. D. Monk, Percy

Green and Robert McPherson is hereby denied and the claim of Roadway Express, Inc. against J. D. Monk, Percy Green and Robert McPherson is dismissed with prejudice.

Shreveport, Louisiana, this *25th* day of May, 1977.

/S/ BEN C. DAWKINS, JR.

Ben C. Dawkins, Jr.
Senior United States District Judge

APPROVED AS TO FORM:

COOK, CLARK, EGAN, YANCY & KING

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By /S/JOHN L. SCHOBER, JR.

John L. Schober, Jr.

Attorney for Roadway Express, Inc.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
NO. 750548

J. D. MONK, PERCY GREEN,
and ROBERT MCPHERSON,
Individually and on Behalf of
All Others Similarly Situated,

v.

ROADWAY EXPRESS, INC., and LOCAL UNION NO. 194
OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

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BEN C. DAWKINS, JR., SENIOR JUDGE

Ruling upon Motion for Rehearing
(By the malpractice insurer of Attorneys Piper, Brown, and Stromile)

We carefully have reviewed the respective briefs, in support of and in opposition to, the above motion and conclude, with one small exception, that the motion should be denied.

That exception is that, in paraphrasing the Court's minutes of April 7, 1976, and May 19, 1976, we stated "(Note: No brief on this subject ever filed by plaintiffs' counsel)." Plaintiffs' counsel, on June 1, 1976, (more than ten days from our minute entry of May 19, 1976,) did file a brief in "Opposition to Defendants motion to Dismiss Or Alternatively for Summary Judgment" [*sic*], wherein they did casually mention the class certification made by the United States District Court for the Western District of Texas in *Salinas v. Roadway Express, Inc., et al*, Civil Action No. S.A.-71-C.A.-254; but presented no solid factual basis for distinguishing between that case and the one before us. They merely speculated as to facts they *hoped* some day to establish by discovery, but furnished the Court with nothing in support of their hope. To this extent, and only *pro tanto*, is our ruling of January 6, 1977, amended.

We reiterate the penultimate paragraph of that ruling:

> "At the October 5, 1976, hearing, counsel for Piper, Brown and Stromile (representing their malpractice insurer) detected several errors in defendants' attorneys' time logs. Counsel should confer and confect a judgment in accordance with the above ruling deleting erroneously or duplicatively billed hours, but otherwise allowing all attorney fees and costs sought. Counsel for defendants justifiably worked hundreds of hours to defend this law suit which Piper, Brown, and Stromile improvidently enlarged and inadequately prosecuted, the cost of which they must now pay."

In this connection, in their brief filed on February 15, 1977, (at pages 3 and 4 thereof) defendants' counsel have made certain concessions as to reductions in their claims for attorney fees, costs, and expenses which should be taken into account. Likewise, defendants' counsel's claim for additional attorney fees, supported by the unopposed affidavit of M. Curtiss McKee, dated February 11, 1977, is allowed and should be included in such judgment.

Counsel for defendants shall present a judgment, approved as to form by counsel for plaintiffs' malpractice insurer, within fifteen days.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 13th day of April, 1977.

/S/BEN C. DAWKINS, JR.

Ben C. Dawkins, Jr.
United States Senior District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Caption Omitted in Printing)

For Plaintiffs	Messrs. ROBERT E. PIPER, JR. FRANK E. BROWN, JR. BOBBY STROMILE PIPER & BROWN 1617 Milam Street Shreveport, Louisiana 71103
For Defendants Roadway Express	JOHN L. SCHOBER, JR. JOE B. CORDILL, JR. Mid South Towers, Suite 806 Shreveport, Louisiana 71101
	M. CURTISS MCKEE FUSELIER, OTT, MCKEE & FLOWERS 1600 Standard Life Jackson, Mississippi 39205
Union	EDWARD B. CLOUTMAN, III MULLINAX, WELLS, MAÙZY & BAAB Post Office Box 47972 Dallas, Texas 75247
For Plaintiffs' Counsel In Matter of Attorneys Fees	HERSCHEL E. RICHARD, JR. CHARLES G. TUTT COOK, CLARK, EGAN, YANCEY & KING 600 Commercial National Bank Building Shreveport, Louisiana 71101

BEN C. DAWKINS, JR., SENIOR JUDGE

Ruling on Motion to Assess Costs, Attorney Fees, and Expenses

With much regret, we must note that this action presents a classic example of attorneys either failing to "look in the book," or, having done so, failing to abide by the plain meaning of the Federal Rules of Civil Procedure; and the most regrettable aspect of this was that it was done deliberately and "vexatiously."

Initiated as a would-be class action under Title VII of the Equal Employment Opportunity Act and the Civil Rights Act of 1866,[1] it now has descended, not only to a forced dismissal of all of plaintiffs' claims because of total and deliberate failure of their counsel properly to prosecute them, but to a determination by us as to whether, and how much, plaintiffs' counsel should pay to defendants for costs, expenses, and attorney fees.

After filing the action in this Court on September 3, 1975, apparently with no prior investigation as to the facts, plaintiffs' counsel did nothing of substance adequately to pursue the interests of their individual clients or of the purported class members. Finally, on June 30, 1976, we granted a motion to dismiss plaintiffs' claims for failure to answer interrogatories (and for other reasons shown *infra*).

The following series of events, condensed and paraphrased from the docket sheet, explains, at least in part, the bases for the motion to assess costs, attorney fees, and expenses now before us:

11-14-75	Motion and order signed for extension of time within which defendants could answer plaintiffs' interrogatories.
1- 5-76	Defendants' first interrogatories to plaintiffs filed.

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[1] 42 U.S.C. § 2000e-5 and 42 U.S.C. § 1981.

4- 7-76 Instruction to counsel to file briefs on the question of whether or not Judge Real's decision of 6-9-75 in *Salinas v. Roadway Express, Incorporated, et al*, S. A. 71 - C. A. 254, a case pending in the Western District of Texas, encompassed plaintiffs and the would-be class; plaintiffs' brief to be filed in 10 days, and defendants to respond within 10 days thereafter.

4-13-76 Notice of the depositions of Green, McPherson, and Monk to be taken 5-6-76 and 5-7-76.

4-13-76 Motion by defendants to compel answers to interrogatories filed 1-5-76. Magistrate Barton then allowed plaintiffs until 10:00 A.M. on 4-21-76 to answer the interrogatories, or show cause why plaintiffs' counsel should not be ordered to do so.

4-21-76 Plaintiffs' attorneys, Piper, Brown, and Stromile failed to appear at 10:00 A.M. due to inadvertence; the hearing was upset and rescheduled for 3:00 P.M. the same day. At 3:00 P.M. all attorneys were present. Plaintiffs were ordered to respond to defendants' interrogatories by 5-24-76. No attorney fees were assessed at that time because defendants did not comply with Local Rule 10(*l*), which requires that they present evidence that an attempt was made to reconcile their differences on objections to discovery.

5-19-76 Plaintiffs were directed to file a brief concerning the instruction given 4-7-76 within 10 days or face dismissal of the action. (Note: No brief on this subject ever filed by plaintiffs' counsel.)

6-14-76 Motion by defendants to dismiss for failure to answer interrogatories, filed.

6-16-76 Order directing plaintiffs to appear on 6-28-76 and show cause why their case should not be dismissed and reasonable costs assessed.

6-19-76 Motion by plaintiffs' counsel for continuance of rule to show cause ordered for 6-28-76 and order continuing hearing until 6-30-76.

6-30-76 Rule to show cause came on for hearing and case was dismissed with prejudice. Counsel were ordered to submit briefs on the question of costs, attorney fees, and expenses.

7-14-76 Plaintiffs' motion and Court's order allowing additional time for plaintiffs to conduct discovery with respect to the costs and attorney fees question.

7-14-76 Motion by Piper, Brown, and Stromile to withdraw as counsel.

10- 5-76 Motion for assessment of attorney fees and expenses came on for hearing.

Plaintiffs' counsel, Messrs. Piper, Brown, and Stromile, point to the fact that defendants failed to answer interrogatories propounded by them on September 2, 1975, until January 5, 1976. Piper, Brown, and Stromile would have us apply by analogy some aspect of the "clean hands" doctrine by arguing that, since defendants delayed in answering plaintiffs' interrogatories, plaintiffs equally were justified in delaying their answers. Plaintiffs' counsel obviously did not feel defendants' delay occasioned any real need for further action, because they never filed a motion to compel answers, pursuant to Rule 33(a) F. R. Civ. P. Furthermore, defendants had sought and received an extension of time within which to answer plaintiffs' interrogatories.

The action originally was set for trial on the merits on January 22, 1976. Defendants needed quick responses to their January 5, 1976, interrogatories because, although the original trial date had been upset, they knew a new trial date would be forthcoming shortly and they must have received answers to the interrogatories in order to decide which, if any, discovery depositions must be taken,

or what further defensive action must be conducted. They filed a motion to compel answers, and the motion was granted, to which plaintiffs *never* have responded and so admitted at the hearing held on June 30, 1976. (See Tr. of that hearing in record.)

Piper, Brown, and Stromile argue that Mr. Cordill, associate counsel for defendants, assured them that they would be given extra time after the date set by a Court order to answer interrogatories since taking the depositions on May 6 and 7 also would be burdensome. (1) Cordill said defendants *would* be agreeable to an extension of time (Piper, Brown, and Stromile Exhibit No. 4). (2) However, plaintiffs' counsel never applied for, or were granted, such an extension by the Court. (3) A Court order required answers by May 24, 1976, and defendants did not file their present motion to dismiss for failure to answer interrogatories and for attorney fees and costs until June 14, 1976, three weeks after the answers were due.

Plaintiffs' failure to respond to defendants' interrogatories was one of the reasons we dismissed the case (another being that their clients had expressed no further interest in it (Tr. 6/30/76, p. 3) and one reason for granting attorney fees and costs against plaintiffs' counsel, but there are others equally as strong.

Defendants gave notice on April 13, 1976, of taking plaintiff McPherson's deposition on May 6, 1976. That plaintiff did not appear on the 6th, so counsel agreed to recess the deposition until May 7, 1976. McPherson again failed to appear, so defendants moved to dismiss McPherson's claims. That motion was deferred to defendants' later motion to dismiss, which, as noted, was granted.

On April 7, 1976, counsel for plaintiffs were instructed to file briefs within ten days as to whether the class action certification entered by Judge Real on June 9, 1975, in

Salinas v. Rozdway, Inc., et al, then pending in the Western District of Texas, encompassed the would-be class in the action before us. No brief was filed by plaintiffs' counsel, even after warning was given to them on May 19, 1976.

These failures by Piper, Brown, and Stromile, as just described, escalated defendants' costs substantially; and excerpts from plaintiffs' depositions evidence that plaintiffs' counsel did not even advise their clients that they were named as class plaintiffs, and the possible consequences of that having been done.[2]

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[2] *MONK:*

"Q Well, do you know the people that you are . . . the names of the people that you are supposed to be representing?

A No, I am not saying . . . I am not sure . . . I don't know who I am representing, if I am representing anybody, I don't know.

Q Was it your intention in filing this suit, Mr. Monk, to represent anybody other than yourself?

A No, just . . . I filed this suit for me.

Q You don't claim to be representing anybody else then?

A No."

(Monk deposition pages 65 through 66, beginning at Line 20.)

"Q When you become a representative of other people, you take on certain responsibilities and liabilities for those people, and my question to you now is, are you willing to assume the responsibilities and liabilities that you have set out in your law suit here of representing other people?

A I wouldn't go as far as to say that, because I don't know anything about their case.

Q All right, sir; if this complaint is as I say it is, that, to-wit, that you are representing other people, do you want it that way?

(*footnote continues*)

It is obvious that plaintiffs' counsel purposefully enlarged and exaggerated the original claims about which

(*footnote continued*)

A Well, I don't know enough about the deal to represent anybody, because I don't know . . . ."

(Monk deposition page 67, beginning at Line 2.)

"Q Well, involved in class actions, Mr. Monk, as I told you earlier, there are some liabilities and some responsibilities imposed on the class representatives, and some of those are costs and expenses and possibly attorneys' fees; and I want to ask you now, if you are willing, on behalf of this class, the people that you describe in this complaint, are you willing to take on the responsibilities for whatever costs may be imposed, whatever expenses may be imposed, or whatever attorneys' fees may be assessed against you on their behalf? Are you willing to do that?

A I don't quite follow you; I don't quite understand; as a matter of fact, I have to ask him, because I don't know exactly what you are talking about now.

Q Well, I am asking you if that's the responsibility that you want, and assume that I am telling you the truth for the purposes of the question, assuming that you may be required to pay for notice to all of the members of this class that you have got described in this complaint; I want you to assume that you may be called upon to pay the costs of Court over there; and I want you to assume that the possibilities are if you lose this suit, that you may be required to pay attorneys' fees on behalf of yourself and all of these people that you claim to represent. And I am asking you do you want to do that?

A I want to pay mine.

Q But you don't want to pay anybody else's?

A No."

(Monk deposition pages 70 through 71, beginning at Line 20.)

"A There may be some, there may be several, I don't know; the case hasn't never been explained to me;

(*footnote continues*)

their clients were complaining. Plaintiffs, themselves, were most unenthusiastic about being class representa-

(*footnote continued*)

there may be several more that have problems that are similar that I don't know about."

(Monk deposition page 69, beginning at Line 11.)

GREEN:

"Q Do you know, Mr. Green, any one that, either you or your attorneys have obtained any written or oral statement from concerning this law suit?

A I don't know what my attorneys have done, sir."

(Green deposition pages 77 to 78, beginning at Line 24.)

"Q Are you aware that you sued the Union?

"A If it take suing the Union, well, then—the Union is not basically doing all the discrimination; it is Neal and his group, but the Union backs them up, like I am a member of the Union."

(Green deposition page 92, beginning at Line 20.)

"MR. STROMILE: We haven't concluded a figure, because we was not able to ascertain certain figures, but the form, the general form, that we would use would be that we would look to the day he made his application, and was turned down and we would determine the amount of pay that would have been received or the compensation that would have been received by the company that time up until now minus the amount that he makes now.

"MR. McKEE: What information do you need . . .

"MR. STROMILE: We want to know . . .

"MR. McKEE: You couldn't get?

"MR. STROMILE: We wanted to know the hourly rate, or as he said, the amount he would make per trip . . . we don't know . . . we would have to know about seniority and all of that, what trips possibly he would have made, being employed by Roadway.

"MR. McKEE: Don't you have access to the Union contract?

(*footnote continues*)

tives, and their responsibilities and liabilities as class representatives surely were not explained to them adequately, if at all.

In order to assess attorney fees and costs against plaintiffs' counsel under 28 U. S. C. § 1927,[3] a two-step process is necessary.

(*footnote continued*)

"MR. STROMILE: I didn't have ... the secretaries weren't in, and the other attorneys weren't in.

"Q Mr. Green, are you a member of a union, and don't you have access to the Union contract with Roadway?

A I don't know; I am a member of the Union.

Q Well, I assume that you knew what the Union scale was for that job."

(Green deposition pages 94-95, beginning at Line 16.)

(One year after filing this suit, this plaintiff and his counsel still had not decided on a final amount for which plaintiff was suing.)

"Q Mr. Green, you don't purport to represent any person who was employed by Roadway Express, do you ...

A (Shakes head negatively.)

Q ... In this class action? You are not claiming to be a person who is adequate to represent someone who works there; aren't you representing the people who applied, but are not ...

A Right, and denied for some discriminatory reason.

Q But you are not asserting yourself as a representative of the people like Monk, for example, who was not promoted; you are not undertaking to represent that class are you?

A No, that's over my head."

(Green deposition page 96, beginning at line 12.)

[3] "§ 1927. Counsel's liability for excessive costs

"Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs."

First, counsel's unreasonable enlargement of plaintiffs' claims has been shown. Counsel never fully explained the true nature of the case to their clients, and clearly failed to represent plaintiffs in such a manner as to protect the rights of a considerably larger class.

"The implication of cases concerning adequacy of representation is that a party who wishes to prosecute an action on behalf of a class must protect the rights and interest of absent class members vigorously, tenaciously and effectively. He must meet the standard at every stage of the proceeding, including preparation of pleadings, pretrial motions, discovery, the trial itself, including the presentation of evidence, any post-trial briefing, and appeal.

* * *

"The standard of thoroughness spills over into the discovery stage. The liberal discovery procedure provided by the federal rules allows counsel for all parties to an action to be prepared for trial on all factual issues and to preserve and protect their clients' positions and evidence. At this stage, as at the early pretrial stage, class counsel owes a greater duty to absent clients than to those who are present. Counsel must undertake substantial discovery to preserve testimony in favor of the class, to rebut possible claims by the parties adverse to the class, and to impeach opposing witnesses. * * * "

Johnson, et al v. Shreveport Garment Co. and Delta Garment Corp., Civil Action 74-494 (W.D. La., 1976), ____ F.Supp. ____, at pages 11 and 12. (Stagg, J.—Involved inadequate presentation of the case. Messrs. Piper and Brown represented plaintiffs.)

Second, the jurisprudence concerning 28 U. S. C. § 1927, except in excusable circumstances, consistently requires that only such costs as normally would be allowed to the prevailing party be allowed. Thus, no punitive

damages should be allowed; rather, an equitable shifting of responsibility for unreasonable and vexatious costs from a party to his counsel is the result the statute envisions.[4]

[4] The following is a brief summary of cases citing 28 U.S.C. § 1927.

(1) Cases which have allowed costs to be assessed directly upon counsel:

Keifel v. Los Vegas Hacienda, Inc., 404 F. 2d 1163 97th Cir., (1968), cert. den. 395 U.S. 908, 89 S. Ct. 1750, rehearing den. 395 U.S. 987, 89 S. Ct. 2128.—Defendant's attorney used harrassing and obstructionist tactics in pre-trial proceedings to the extent that a new trial had to be granted in the case.

Weiss v. United States, 227 F. 2d 72 (2d Cir., 1955), cert. den. 350 U.S. 936, 76 S. Ct. 308, rehearing den. 350 U.S. 977, 76 S. Ct. 431.—Plaintiff's attorney was given a warning that fees might be assessed against him for time and time again bringing suits to collect the proceeds of life insurance policies with little variation of his original complaint which suit he lost.

Toledo Metal Wheel Co. v. Foyer Brothers & Co., 223 F. 350 (6th Cir., 1915).—Defendant's counsel excessively cross-examined witnesses, and improperly instructed another witness not to answer proper questions asked him in a deposition, and therefore costs were awarded against the attorney directly under the predecessor statute to 28 U.S.C. § 1927.

Harrell v. Joffrion, ____F. Supp.____, Civil Action 74-1072 (W. D. La., 1976), affirmed in *per curiam* by Fifth Circuit on December 29, 1976.—All costs, including those of empanelling the jury, were assessed directly upon plaintiff's counsel for vexatiously increasing costs by totally failing to prove any evidence of malpractice in a medical malpractice suit.

(2) Cases failing to allow costs to be assessed directly on counsel because their conduct was not vexatious or unreasonable enough to warrant such an award:

United States v. Ross, 535 F. 2d 346 (6th Cir., 1976).—Counsel did not vexatiously or intentionally increase costs.

Hanley v. Condrey, 467 F.2d 697 (2d Cir., 1972).—Costs were not assessed directly upon counsel though his appeal was

(*footnote continues*)

As shown, the jurisprudence is legion that 42 U. S. C. § 2000e-5(k)[5] gives the trial Judge extensive discretion to

(*footnote continued*)

patently frivolous since to do so might require notice and a hearing. (Here, we did have a hearing on October 5, 1976.)

1507 Corporation v. Henderson, 447 F. 2d 540 (7th Cir., 1971).—28 U.S.C. § 1927 does not allow the imposition of attorney fees against an opposing party who brought a *pro se* complaint.

West Virginia v. Charles Pfizer & Co., 440 F. 2d 1079 (2d Cir., 1971), cert. den. 404 U.S. 871, 92 S. Ct. 731.—There was not sufficient evidence of bad faith for costs to be assessed directly on counsel.

Miles v. Dickson, 387 F. 2d 716 (5th Cir., 1967).—The Court felt that plaintiff's attorney acted in good faith, so no attorney fees were awarded against him personally.

Brislin v. Killmanna Holding Corp., 85 F. 2d 667 (2d Cir., 1936).—The Court did not allow costs to be assessed against counsel personally, but reiterated that the trial Judge had great discretion to determine the extent to which an attorney before him had vexatiously and unreasonably increased costs.

Motion Picture Patents Co. v. Steiner, 201 F. 63 (2d Cir., 1912).—The record did not reveal evidence that counsel was being vexatious by prolonging examination of witnesses, therefore costs were not allowed against him personally. (This involved the predecessor statute to 28 U.S.C. § 1927.)

Chrysler Corp. v. Lakeshore Commercial Finance Corp., 389 F. Supp. 1216 (D.C. Wis., 1975).—Costs were not awarded directly against counsel because there was a lack of evidence that counsel prompted the suit rather than plaintiff. (here, there is direct evidence that counsel multiplied the proceedings by bringing a class action when plaintiffs did not know about or consent to it.)

[5] "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

assess appropriate attorney fees in cases justifying such an award. Of course, any such award should not discourage plaintiffs and their attorneys from filing what they in good faith believe to be valid complaints either individually or on behalf of a class, but will not condone vexatious litigation or expect defendants, or their counsel, to oppose unreasonably enlarged complaints such as these.

In a recent Act approved October 19, 1976, Congress amended Title 42 to allow attorney fees to the prevailing party in a suit brought under 42 U. S. C. § 1981,[6] one of the statutes under which plaintiffs here have sued. It is abundantly clear from the above paragraph and from the very recent amendment to Title 42 that Congress has decided to allow attorney fees to be awarded more liberally in civil rights cases than in the past. The awards are not penalties, rather they are considered costs of effecting justice, and they are to be awarded judiciously.

An award of attorney fees is granted in many cases to assure plaintiffs a day in court. In this instance, we feel that an equally important interest is recognized, namely the discouragement of deliberate inaction by plaintiffs'

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[6] Public Law 94-559, 90 Stat. 2641:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as 'The Civil Rights Attorney's Fees Awards Act of 1976'.

"Sec. 2. That the Revised Statutes section 722 (42 U.S.C. 1988) is amended by adding the following: 'In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs'."

counsel which prejudices both plaintiffs, by jeopardizing their claims, and defendants, by multiplying their costs.

Piper admitted several times that his law firm had been "dilatory" in prosecuting plaintiffs' case, but counsels' fault went much deeper than mere tardiness; they failed to respond to our orders; first, an order to file a brief clarifying whether a class action pending in the Western District of Texas encompassed the purported class here (counsel failed to file this brief even after a second notice which included a warning of dismissal if the brief were not filed promptly); and second, an order to answer interrogatories. Finally, and most significantly, plaintiffs' counsel deliberately used three plaintiffs who did not understand the law suit filed on their behalf or agree to represent others, to broaden the case into a class action.

At the October 5, 1976, hearing, counsel for Piper, Brown, and Stromile (representing their malpractice insurer) detected several errors in defendants' attorneys' time logs. Counsel should confer and confect a judgment in accordance with the above ruling deleting erroneously or duplicatively billed hours, but otherwise allowing all attorney fees and costs sought. Counsel for defendants justifiably worked hundreds of hours to defend this law suit which Piper, Brown, and Stromile improvidently enlarged and inadequately prosecuted, the cost of which they must now pay.

Attached are the attorneys' affidavits (itemizations attached), otherwise undisputed, showing the number of hours they expended in preparing for what appeared to be a most serious law suit. Simply because the case never was tried does not justify depriving them of fees they justly have earned, all because of plaintiffs' counsels' "vexatious" behavior.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 6th day of January, 1977.

/S/BEN C. DAWKINS, JR.

Ben C. Dawkins, Jr.
United States Senior
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
NO. 75-0548-S

J. D. MONK, *Et Al*
Plaintiffs

vs.

ROADWAY EXPRESS, INC., *Et Al*
Defendants

Affidavit of M. Curtiss McKee Relative to Attorneys' Fees and Expenses Incurred by Roadway Express, Inc. With the Firm of Fuselier, Ott, McKee & Flowers

STATE OF MISSISSIPPI
COUNTY OF HINDS

PERSONALLY appeared before me, the undersigned authority in and for the jurisdiction aforesaid, while within my jurisdiction, M. Curtiss McKee, who, after being duly sworn by me, stated to me upon his oath as follows:

1. My name is M. Curtiss McKee. I am a member of the law firm of Fuselier, Ott, McKee & Flowers, 2100 Deposit Guaranty Plaza, Jackson, Mississippi. On or about August 5, 1975, my firm was retained to represent Roadway Express, Inc. in connection with the above captioned cause. My firm has been counsel for Roadway Express, Inc. in other matters prior to this one.

2. The practice of this firm is confined to labor relations law and related matters for the manage-

EXHIBIT A

ment only. I am familiar with the guidelines established by the Fifth Circuit Court of Appeals in *Johnson* v. *Georgia Highway Express*, 488 F.2d 714, 7 EPD ¶ 9079 (5th Cir., 1974), for awarding reasonable attorneys' fees to the prevailing party in a Title VII action. The relevant charges for our services and our expenses are set out in an Affidavit previously filed in this cause and detailed in a summary sheet attached hereto as Appendix 1 and by copies of our Statement attached as Appendix 2 showing thereon amounts of such statements attributable to the above captioned cause. The appendices show services rendered between August, 1975, and July, 1976, up to and including the date of this Affidavit. These charges include the legal services of senior counsel for 184¼ hours at an hourly rate of $50 per hour, and junior counsel for 55½ hours at a $40 per hour for a total payment by Roadway Express, Inc. for legal services and expenses during the above period of August 5, 1975 through July 8, 1976.

3. Since my firm was retained on or about August 5, 1975, we have recommended to the client and, Roadway Express, Inc., in due course, employed the services of Fiest, Schober & Howell (John L. Schober, Jr., Esquire) of Shreveport, Louisiana, to assist in the conduct of this litigation; the action being laid in the Shreveport Division of the Western District of Louisiana.

4. My law firm work, as stated previously, is exclusively in the practice of labor relations law and associated matters on behalf of management. Approximately 60 percent of this firm's practice involves administrative law practice before the Equal Employment Opportunity Commission or in the Federal Court System litigation under Title VII of the Civil Rights Act of 1964, as amended, or related laws such as 42 USC ¶ 1981 through ¶ 1983. The balance of the

practice is concerned with the National Labor Relations Act, National Labor Relations Board, OSHA and Wage and Hour matters, all of which are strictly confined to the employer-employee relationship. We feel that we have special expertise in these matters.

5. All of the charges for legal services and expenses shown in Appendices 1 and 2 attached were reasonable and necessary for the client's proper representation and in accordance with the customary charges made for the same services in Jackson, Mississippi, and in Shreveport, Louisiana. In addition, the attorneys' fees charged for services performed are the firm's standard and customary charges for such services at the time they were rendered. While the firm has charged more for similar services to other clients, the hourly rate charges for these services for other clients has not been less. The total amount of fees and expenses charged by this firm to Roadway Express, Inc. as a result of this litigation is $12,926.20.

/S/M. CURTISS MCKEE

M. Curtiss McKee

SWORN TO and subscribed before me this 8th day of July, 1976.

/S/MARTHA F. TRAVIS

Notary Public

My Commission Expires:

My Commission Expires June 12, 1977

Costs—Roadway v. Monk

August, 1975		
3¼ Hours at $50.00	$ 162.50	
L.D. Phone Charges	18.88	
		$ 181.38
September, 1975		
9 Hours at $50.00	450.00	
L.D. Phone Charges	8.54	
Xerox Copies	12.31	
		470.85
October, 1975		
3¾ Hours at $50.00	187.50	
L.D. Phone Charges	53.98	
Xerox Copies	5.00	
Postage	4.00	
		250.48
November, 1975		
3¾ Hours at $50.00	187.50	
L.D. Phone Charges	10.59	
Xerox Copies	12.48	
		210.57
December, 1975		
9 Hours at $50.00	450.00	
L.D. Phone Charges	46.17	
Xerox Copies	37.69	
Postage	1.60	
		535.46

APPENDIX 1

January, 1976		
17¾ Hours at $50.00	887.50	
L.D. Phone Charges	19.05	
Xerox Copies	10.00	
Postage	3.00	
Air Fare, Meals & Parking (Shreveport Trip)	66.72	
		986.27
February, 1976		
¾ Hour at $50.00	37.50	
L.D. Phone Charges	6.50	
		44.00
March, 1976		
2¾ Hours at $50.00	137.50	
12¾ Hours at $40.00	510.00	
Xerox Copies	12.00	
		659.50
April, 1976		
11¼ Hours at $50.00	562.50	
26 Hours at $40.00	1,040.000	
L.D. Phone Charges	62.62	
Xerox Copies	51.68	
Postage	6.00	
		1,722.80
May, 1976		
44½ Hours at $50.00	2,225.00	
3¾ Hours at $40.00	150.00	
L.D. Phone Charges	25.64	
Xerox Copies	24.84	
Plane Fare, Motel & Meals (Shreveport Trip)	154.54	
		2,580.02

June, 1976		
60½ Hours at $50.00	3,025.00	
13 Hours at $40.00	520.00	
L.D. Phone Charges	46.06	
Xerox Copies	84.00	
Ray J. Hanrahan Invoice	282.00	
Postage	12.12	
Air Fares	242.00	
Motel, Meals, Trips & Taxis	116.57	
		4,327.75
To July 8, 1976		
18 Hours at $50.00	900.00	
Xerox Copies	57.12	
		957.12
		$12,926.20

August 31, 1975

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

8/5	Phone conference with Mr. Kaminski re Title VII matter (Shreveport)	
8/7	Phone conference re information on Gardner case	
8/18	Memo from Mr. Moeller; Third Interrogatories (Gardner); letter from Mr. Kaminski; Complaint (Monk, et al)	(1¼)
8/19	Phone conference with Mr. Kaminski; study Complaint; phone conference with Mr. Schober (Monk, et al)	(¼)
8/21	Phone conference with Mr. Schober (Monk); letter from Mr. May; Supplemental Answers to Interrogatories (Gardner)	(¼)
8/25	Objections to Third Interrogatories (Gardner)	
8/26	Two phone conferences with Mr. Kaminski; phone conference with Mr. Schober (Monk); study file and prepare Objections to Third Interrogatories (Gardner)	(¾)

APPENDIX 2

8/27	Preparation of Supplemental Answers to Interrogatories; work on Objections to Third Interrogatories; letter to Clerk; letter to Clients; second letter to Clerk (Gardner); phone conference with Mr. Kaminski; phone conference with Mr. Schober; phone conference with Mr. Kaminski (Monk)	(¾)	
	Total of 11 Hours at $50.00	550.00	
	Total of ½ Hour at $40.00	20.00	
	L.D. Phone Charges	27.32	
	83 Xerox Copies at 12 cents	9.96	
	Luncheon Conference with Mr. Morgan in July	13.29	
	Postage	3.91	
			$624.48
	3½ Hrs @ 50.00	162.50	
	L.D. Phone	18.88	
			$181.38

September 30, 1975

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

9/2	Letter from Mr. Kaminski	(¼)

9/3	Review Answer; Letter from Mr. Schober; letter from Mr. Kaminski (Monk)	(2)	
9/8	Study proposed Answer; study Gunn's files; research; letter to Mr. Kaminski re Interrogatories, letter to Mr. Kaminski re Answer (Monk)	(4½)	
9/11	Letter to Mr. Chapin; Letter from court		
9/25	Phone conference with Mr. Kaminski; amending Answer	(1¾)	
9/26	Letter to Mr. Schober; Answer transmitted (Monk)	(½)	
9/30	Letter to Mr. Boyd; phone conference with Judge Nixon		
	Total of 12½ Hours at $50.00	625.00	
	L.D. Phone Charges	8.54	
	114 Xerox Copies at 12 cents	13.68	
			$647.22
	9 Hrs. @ 50.00	$450.00	
	L.D. Phone	8.54	
	Xerox Copies	12.31	
			$470.85

October 31, 1975

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

10/7	Conference with Messrs. Boyd and McRae	
10/8	Pre-trial hearing; conference with Messrs. Boyd and McRae; phone conference with Mr. Chapin; letter to Mr. Chapin; phone conference with Mr. Kaminski (Gardner); phone conference with Mr. Kaminski and phone conference with Mr. Schober (Monk)	(1)
10/9	Phone conference with Mr. Kaminski	(¼)
10/10	Phone conference with Mr. Kaminski	(¼)
10/13	Phone conference with Mr. Kaminski; phone conference with Mr. Boyd; phone conference with Mr. Kaminski; phone conference with Mr. Boyd; Order to Dismiss With Prejudice; Release; letter to Mr. Chapin (Gardner); phone conference with Mr. Kaminski; study Interrogatories; phone conference with Mr. Schober (Monk)	(2¼)
10/14	Hearing at Judge Nixon's office; phone conference with Mr. Kaminski (Gardner)	
10/15	Order on Interrogatories; letter from Client	
10/20	Letter from Company (Gardner)	

10/24	Phone conference with Mr. Kaminski; phone conference with Mr. Chapin	
10/30	Letter to Judge Nixon; letter to Mr. Chapin; Release to Mr. Chapin	
	Total of 13½ Hours at $50.00	675.00
	L.D. Phone Charges	59.98
	177 Xerox Copies at 12 cents	21.24
	Postage	5.54
	Lynn Dudley (Inv. Att.)	42.75
		$804.51
	3¾ Hrs. at $50.00	187.50
	L.D. Phone	53.98
	Xerox Copies	5.00
	Postage	4.00
		$250.48

November 30, 1975

In Account With:

BUCKINGHAM, DOOLITTLE AND BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

11/3	Letter to Mr. Schober and Mr. Kaminski (Monk)	(¼)
11/6	Letter from Mr. Gunn; letter to Mr. Gunn (Gardner)	

11/10	Letter from Mr. Gunn; study materials (Monk); phone conference with Mr. Kaminski; phone conference with Mr. Schober	(¾)
11/11	Prepare Motion, Notice of Motion, Memorandum, Affidavit, and Order (Monk)	(2½)
11/19	Letter from Court; letter to Mr. Kaminski; letter from Mr. Gunn	
11/25	Phone conference with Mr. Kaminski, Mr. Gunn and Mr. May	(¼)
11/26	Letter to Mr. Kaminski; Union's Answer	
	Total of 4¾ Hours at $50.00	237.50
	L.D. Phone Charges	10.59
	104 Xerox Copies at 12 cents	12.48
		$260.57
	3¾ Hrs. at $50.00	187.50
	L.D. Phone	10.59
	Xerox Copies	12.48
		$210.57

December 31, 1975

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

12/3	Phone conference with Mr. Gunn (Griffin)	
12/4	Phone conference with Mr. May	
12/5	Received letter and file from Mr. Gunn (Griffin)	
12/12	Prepare Motion and Order; letter to Mr. Cupit (Griffin)	
12/16	Letter from Mr. May (Monk)	(¼)
12/22	Letter from court (Calendar); phone conference with Mr. Schober; letter from Mr. Gunn; letter to Mr. Gunn (Monk); phone conference with Clerk; phone conference with Judge Cox; letter from Mr. Cupit (Griffin)	(2)
12/23	Received additions to Calendar from Court; copy to Clients (Monk)	(¼)
12/24	Answers to Interrogatories; Letter to Mr. May; copy to Mr. Kaminski and Mr. Gunn (Monk)	(5)

12/29	Phone conference with Mr. Schober (Monk)	(½)	
12/30	Phone conference with Mr. Kaminski	(½)	
12/31	Received Letter and enclosure from Mr. May; phone conference with Mr. Schober (Monk)	(½)	
	Total of 12 Hours at $50.00	600.00	
	L.D. Phone Charges	46.17	
	349 Xerox Copies at 12 cents	41.88	
	Postage	1.60	
			$689.65
	9 Hrs. @ 50.00	$450.00	
	L.D. Phone	46.17	
	Xerox Copies	37.69	
	Postage	1.60	
			$535.46

January 31, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

1/2	Interrogatories, Notice of Deposition, Motion to Continue; phone conference with Mr. Schober; received letter and signed pages of Answers from Mr. May	(4¾)

	(Monk); study Interrogatories and study file re Answer and Motions and Responses generally (Griffin)	
1/3	Phone conference with Mr. Chapin; phone conference with Mr. Wood	
1/4	Review file	(1¾)
1/5	Travel to Shreveport; conference with Mr. Schober, Mr. Cordell, Mr. Piper and Mr. Brown; phone conference with Mr. Kaminski; phone conference with office	(10)
1/7	Phone conference with Mr. Cordell; phone conference with Mr. Kaminski; phone conference with Mr. Gunn (Monk); phone conference with Mr. Gunn (Griffin); letter to Mr. Gunn with copy of CCH report; study file (Monk)	(¾)
1/16	Conference with Ms. Devine re Interrogatories to Plaintiff	(¼)
1/19	Received letter and attachments from Mr. Gunn	(¼)
1/21	Letter to Mr. Haycraft of EEOC with copies to Client; conference between Mr. McKee and Mr. Ott; study file (Complaint, Plaintiff's Interrogatories and Defendant's Interrogatories)	

1/29 ..... Letter from Mr. Cupit; Amendment of Described Class; letter to Mr. Gunn (Griffin)

Total of 50¾ Hours at $50.00	1,237.50	
L.D. Phone Charges	19.05	
100 Xerox Copies at 12 cents	12.00	
Postage	3.50	
Air Fare	55.05	
Meal and Parking	11.67	
		$1,338.77
17¾ Hrs. @ 50.00	$887.50	
L.D. Phone	19.05	
Xerox Copies	10.00	
Postage	3.00	
Air Fare, Meals & Pkg.	66.72	
		$986.27

February 29, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

2/5 ..... Letter from Mr. Cupit, copy to Client; letter to Client (Griffin); phone conference with Mr. Schober re depositions (Monk); study file; draft Answer (Griffin) (¾)

2/6 ..... Research; preparation of Answer; phone conference with Mr. Gunn; re-

search relation back of expansionist amendment (Griffin)

2/9 ..... Phone conference with Mr. Kaminski; phone conference with Mr. May; letter from EEOC and file; letter to Mr. Gunn re EEOC file; research relation back of amendments—variance from charges; conference between Mr. Ott and Mr. McKee

2/10 ..... Letter from Mr. Cupit; two phone conferences with Mr. May; letter to Mr. Gunn; prepare draft of Answer and forward to Mr. Gunn; copy to Mr. Kaminski; research timeliness and relation back of amendments; conference between Mr. McKee and Mr. Ott

2/11 ..... Phone conference with Mr. Gunn; phone conference with Mr. May

2/12 ..... Phone conference with Mr. May

2/17 ..... Letter and material received from Mr. Gunn; research 180-day deferral to agency action as relates to third charge

2/18 ..... Letter to Mr. Schober

2/19 ..... Answer to Interrogatories; phone conference with Mr. May; research 180-day limitation—for Motion purposes; letter to Mr. Gunn with addition to catalog; letter to Mr. May enclosing Interrogatories

2/20	Received copy of Mr. Cupit's letter to Clerk; Motion for Sanctions for Failure to Answer Interrogatories and Notice; letter to Mr. Cupit; copy of Clients; phone conference with Mr. May; research 180-day requirement		
2/24	Letter from Mr. Cupit; letter to Mr. Cupit; copy to Clients		
2/26	Received Answers to Interrogatories from Mr. May; letter to Clerk filing Answers; copy to Mr. Cupit and Clients		
2/27	Phone conference with Mr. Kaminski; phone conference with Mr. Gunn; letter to Clerk; Notice of Motion; Brief on Motion		
Total of 28¾ Hours at $50.00		1,437.50	
L.D. Phone Charges		40.97	
219 Xerox Copies at 12 cents		26.28	
Postage		2.73	
EEOC Copies		1.00	
			$1,508.48
¾ Hour @ $50.00		$37.50	
L.D. Phone		6.50	
			$44.00

March 31, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

3/1	Phone conference with Mr. Kaminski; Brief on Motion to Dismiss; Interrogatories; phone conference with Mr. Cupit; letter to Clerk; copy to Clients	
3/2	Prepare Interrogatories to Plaintiff; letter to Mr. Gunn; research and prepare Brief on Motion to Dismiss (Griffin)	
3/3	Prepare affidavit of Mr. Gunn; work on Brief; letter to Mr. Gunn	
3/4	Letter from Mr. Gunn with signed copy of Presley statement; Copy of letter from Mr. Cupit to Clerk; copy of Motion to Compel Discovery and Notice; letter to Clerk filing Interrogatories; letter to Mr. Gunn enclosing copies of Brief and Interrogatories	
3/5	Letter from Mr. Cupit; letter to Mr. Gunn; letter from Mr. Gunn (Griffin); letter to Mr. Schober (Monk)	(½)
3/16	Letter to Mr. Cupit; phone conference with Ms. Crews	
3/17	Phone conference with Mr. Gunn; study affidavit (Griffin); phone conference with Mr. Schober (Monk)	(¼)

3/18	Letter from Mr. Gunn enclosing signed affidavit; letter from Mr. Gunn enclosing catalog	
3/22	Phone conference with Mr. Gunn; letter from Mr. Kaminski (Griffin); phone conference with Mr. Schober re depositions (Monk)	(½)
3/23	Letter to Mr. Gunn; letter to Mr. Kaminski; letter to Judge Cox; Brief finalized; letter to Clerk; affidavit; letter from Mr. Cupit (Griffin)	
3/24	Research Affirmative Defenses and Rule 12 Motion re Monk suit; research and preparation re Motion to Compel Answers to Interrogatories and Sanctions	(2¼)
3/25	Research re Rule 12 and class action aspects of Monk suit	(1)
3/26	Motion to Compel and Notice; letter to Mr. Schober; conference between Mr. Moeller and Mr. McKee	(1½)
3/29	Conference between Mr. Moeller and Mr. McKee re Motion and Order to Answer Interrogatories, Rule 12 Motion	(½)
3/30	Research re class action issues in Monk suit	(3)
3/31	Research re Motion to Dismiss or for Summary Judgment in Monk suit	(6)

Total of 21 Hours at $50.00	1,050.00
Total of 12¾ Hours at $40.00	510.00
481 Xerox Copies at 12 cents	57.72
	$1,617.72
2¾ Hrs at $50.00	137.50
12¾ Hrs at $40.00	510.00
Xerox Copies	12.00
	$659.50

April 30, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

4/1	Received Motion for Preliminary Injunction, Notice of Motion, Affidavit of Nanci B. Griffin, and Affidavit of Charles A. Haycraft; copy to Clients; prepare for Motions; research and preparation of Memorandum	(5)
4/2	Conference with Mr. Cupit; served with Affidavit; U. S. District Court Hearing on Motion to Dismiss/ Summary Judgment—Plaintiff's Motion to Compel and for Preliminary Injunction; letter to	(4)(¼)

	Mr. Gunn; letter from Mr. Cupit (Griffin); letter to Mr. Gunn (Monk); preparation of Brief in Monk suit	
4/3	Preparation of Brief in Monk suit	(2¾)
4/5	Preparation of deposition questions for Plaintiffs Monk, Green and McPherson	(6¾)
4/7	Preparation of deposition questions for Monk, Green and McPherson and Memorandum in Support of Motion to Dismiss or Summary Judgment; phone conference with Mr. Cupit; phone conference with Mr. Gunn; letter to Mr. Gunn (Griffin); phone conference with Mr. Gunn (Monk); review Brief; phone conference with Mr. Schober; review deposition questions	(2¼)(2¾)
4/8	Conference between Mr. McKee and Mr. Moeller re Memorandum of Authorities in Support of Motion to Dismiss; preparation of Affidavit of Mr. Gunn; research and preparation of Motion for Summary Judgment and Notice of Motion; Notice of Depositions; phone conference with Mr. Kaminski; second phone conference with Mr. Kaminski; phone conference with Mr. Schober (Monk)	(4)(2)

4/9	Letter from Mr. Cupit, copy to Mr. Gunn and Mr. Kaminski (Griffin); phone conference with Mr. Kaminski; letter to Mr. Kaminski; letter from Mr. Schober; letter from Judge Dawkins; study San Antonio matter (Monk)	(1½)
4/12	Preparation of Monk Memorandum in Support of Motion to Dismiss; review Affidavit, Notice of Motion; phone conference with Mr. Kaminski; letter to Mr. Gunn (Monk)	(¾)(¾)
4/14	Study file; received copy of letter from Mr. Kaminski to Mr. Presley (Griffin); review Brief and Motions; letter to Mr. Gunn enclosing Affidavit; letter to Baab and Cloutman enclosing copies of all pleadings; received copies of Motion, Notice, Order and Notice of taking Depositions from Mr. Schober (Monk)	(2)
4/15	Conference between Mr. McKee, Mr. Ott and Mr. Moeller re Monk Brief; letter from Mr. Gunn; received information requested from Shreveport office; letter to Mr. Schober (Monk)	(½)(¾)
4/28	Received copy of filed documents from Mr. Schober; letter to Mr. Schober requesting hearing date; phone conference with Ms. Brown (Monk)	(¼)

Total of 22½ Hours at $50.00	1,125.00	
Total of 40¼ Hours at $40.00	1,610.00	
L.D. Phone Charges	65.99	
700 Xerox Copies at 12 cents	84.00	
Postage	9.54	
		$2,894.53
11¼ Hrs. @ 50.00	$ 562.50	
26 Hrs. @ 40.00	1,040.00	
L.D. Phone	62.62	
Xerox Copies	51.68	
Postage	6.00	
		$1,722.80

May 31, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

5/4	Two phone conferences with Mr. Schober	(½)
5/5	Received letter and attachments from Ms. Neal of Shreveport Terminal; letter from Mr. Cordill; travel to Shreveport; prepare for depositions	(8¼)

5/6	Deposition of Green and McPherson; prepare for Monk deposition	(10)
5/7	Deposition of Monk; return to Jackson	(10)
5/10	Phone conference with Mr. Kaminski; study file; conference between Mr. McKee and Mr. Moeller; phone conference with Mr. Schober (Monk)	(½)(6¼)
5/11	Conference between Mr. McKee and Mr. Moeller re remployment register; preparation of Motion to Dismiss, Notice of Motion and two Affidavits in Support of Motion to Dismiss; conference between Mr. Moeller and Mr. McKee re Affidavits; research and preparation of Memorandum in Support of Motion to Dismiss Complaint of McPherson (Monk); phone conference with Mr. Kaminski; draft of letter to Dawkins; letter to Mr. Schober; prepare affidavit of Mr. Cordill (Monk)	(3¼)(8)
5/12	Phone conference with Mr. Cordill (Monk); phone conference with Mr. Kaminski; letter to Mr. Cupit (Griffin)	(½)
5/13	Phone conference with Mr. Cordill (Monk)	(½)
5/14	Letter from Mr. Gunn; letter from Mr. Cupit; letter to Mr. Cupit;	(½)

	prepare Notice of Deposition, Presley; letter to Clerk enclosing Notice (Griffin); phone conference with Mr. Schober (Monk)		
5/24	Preparation of Order re Motion to Dismiss (Griffin)		
5/28	Draft Order; letter from Court; phone conference with Mr. Cupit; letter to Mr. Gunn (Griffin); delivered order to Mr. Cupit		
5/31	Conference with Mr. Cupit (Griffin)		
	Total of 47½ Hours at $50.00	2,375.00	
	Total of 5 Hours at $40.00 ..	200.00	
	L.D. Phone Charges	25.64	
	207 Xerox Copies at 12 cents	24.84	
	Air Fare	75.00	
	Motel, Meals, Taxis, and Parking	79.54	
			$2,780.02
	44½ Hrs. @ 50.00	2,225.00	
	3¾ Hrs. @ 40.00	150.00	
	L.D. Phone	25.64	
	Xerox Copies	24.84	
	Plane Fare, Motel & Meals	154.54	
			$2,580.02

June 30, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway Express, Inc.

6/1	Hearing, Judge Cox signs Order; letter from Mr. Cupit; letter to Clerk (Griffin); phone conference with Mr. Schober (Monk)	(¼)
6/2	Phone conference with Ms. Brown re phone conference with Mr. Schober (Monk)	(¼)
6/3	Received Order from Clerk; copy to Clients (Griffin)	
6/5	Phone conference with Ms. Brown re conversation with Mr. Gunn (Griffin)	
6/7	Phone conference with Ms. Warwick re letter received from Mr. Cordill enclosing Motion filed (Monk)	(¼)
6/10	Letter from Mr. Cordill; study Brief of Plaintiffs (Monk); letter from Mr. Gunn; letter to Mr. Cupit (Griffin)	(1)
6/11	Phone conference with Mr. Gunn and Mr. Kaminski re Monk and Griffin; letter to Mr. Cupit (Griffin); phone	(2¾) (3½)

	conference with Mr. Schober (Monk); research re Plaintiff's Response to Motion for Summary Judgment and Memorandum; conference between Mr. McKee and Mr. Moeller re same and alternatives; study Brief of Plaintiffs	
6/14	Letter from Mr. Gunn	(¼)
6/16	Letter from Mr. Schober; letter to Mr. Gunn (Monk)	(½)
6/17	Phone conference with Mr. Schober; phone conference with Mr. Gunn and Mr. Kaminski re Show Cause Order (Monk)	(1)
6/18	Letter from Court and letter to Mr. Gunn re Show Cause Order (Monk)	(½)
6/19	Study depositions of McPherson, Green and Monk; outline same	(3)
6/23	Study files; prepare for deposition (Monk)	(4)
6/24	Prepare for deposition; travel to Akron; conference with Mr. Gunn and Mr. Kaminski (Monk); review depositions of Monk and Green; research for Brief	(2)(10)
6/25	Research and preparation of Brief; conference with Mr. Gunn, Mr. Kaminski and Mr. Presley; deposition of Mr. Presley; return to Jackson (Monk)	(7½)(12)

6/26	Conference with Mr. Cupit (Griffin); study Brief (Monk)	(½)	
6/28	Study Brief; conference between Mr. McKee and Mr. Moeller re Brief in Support of Position and re oral argument at hearing; phone conference with Mr. Schober; phone conference with Mr. Gunn (Monk)	(¾)(7)	
6/29	Conference with Ms. Travis; Brief revisions; travel to Shreveport; conference with Mr. Schober and Mr. Cordill; prepare affidavit (Monk)	(6½)	
6/30	Conference with Mr. Schober and Mr. Cordill; Show Cause Hearing; affidavit supplementing Attorneys fees and expenses; phone conference with Mr. Kaminski; conference with Judge Dawkins (Monk)	(10)	
Total of 63½ Hours at $50.00		3,175.00	
Total of 13 Hours at $40.00		520.00	
I.D. Phone Charges		46.06	
700 Xerox Copies at 12 cents		84.00	
Postage		12.12	
Ray J. Hanrahan (Court Reporter-Inv. Att.)		282.00	
Air Fare		242.00	
Motels, Meals, Tips and Taxis		116.57	
			$4,477.75

60½ Hrs @ 50.00	3,025.00	
13 Hrs @ 40.00	520.00	
L.D. Phone	46.06	
700 Xerox Copies	84.00	
Postage	12.12	
Ray J. Hanrahan Inv.	282.00	
Air Fare	242.00	
Motels, Meals, Tips & Taxis	116.57	
		$4,327.75

July 8, 1976

In Account With:

BUCKINGHAM, DOOLITTLE & BURROUGHS
1 Cascade Plaza
Akron, Ohio 44308

Re: Roadway, Express, Inc.

Services Through July 8, 1976

7/1	Return from Shreveport (Monk); phone conference with Mr. Cupit (Griffin); prepare Affidavit; letter to Mr. Gunn; phone conference with Mr. Gunn (Monk)	(4½)
7/2	Prepare Affidavits and limitations for Attorneys' fees; work on Brief on Attorneys' fees (Monk); phone conference with Mr. Gunn; prepare Notice; phone conference with Court Reporter (Griffin)	(6)

7/6	Prepare Brief on Attorneys' fees (Monk); letter from Court Reporter; letter from Mr. Cupit; study files; letter to Mr. Cupit; letter to Mr. Gunn (Griffin)	(3)	
7/7	Phone conference with Mr. Schober; work on Brief, Affidavits and Exhibits (Monk)	(1½)	
7/8	Preparation of Brief and Affidavits in Support of Award for Attorneys' fees (Monk)	(3)	
	Total of 23¼ Hours at $50.00	1,162.50	
	491 Xerox Copies at 12 cents	58.92	
			$1,221.42
	18 hrs @ $50.00	900.00	
	476 Xerox Copies	57.12	
			$957.12

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
NO. 75-0548-S

J. D. MONK, *Et Al*
Plaintiffs

vs.

ROADWAY EXPRESS, INC., *Et Al*
Defendants

AFFIDAVIT

Now comes Edward C. Kaminski, the undersigned, being first duly sworn, states that:

He is a partner in the law firm of Buckingham, Doolittle & Burroughs which is general counsel for Roadway Express, Inc. He is a labor attorney and services Roadway Express with regard to corporate labor and civil rights matters. He represented Roadway in Akron, Ohio in connection with the captioned lawsuit. In this connection he kept track of his time expended on this case on diary sheets which describe the service performed and the amount of time expended, which diary sheets are attached hereto. The total amount of time expended up to May 12, 1976 was 25.2 hours. His usual and customary hourly rate for such services is $60 per hour and on that basis the value of the services performed, and for which Roadway has been charged, up to May 12, 1976 is $1,512.00 in connection with this case.

/S/EDWARD C. KAMINSKI

(Subscription Omitted In Printing)

EXHIBIT B

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE TICKET

CLIENT Roadway Express DATE 8-8-75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
letter forwarding com- CONFERENCE		01		
plaint to attorneys in TELEPHONE		02		
Shreveport and Jack- CORRESPONDENCE		03		
son RESEARCH		04		
FILE REVIEW		05		
				3
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		3
	TOTAL HOURS			

FORM NO. 274

604

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE T ET

CLIENT Roadway DATE 8-19-75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
conference with — CONFERENCE		01		
Mr. McKee re: — TELEPHONE		02		
status of answer — CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
				4
ATTORNEY'S INITIALS & NO. — INITIALS ECK — NUMBER				4
TOTAL HOURS				

FORM NO. 2.74

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE T ET

CLIENT Roadway Express DATE 8/26/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Studying default notice, con-				
ference with Teamsters re				
same, and several conferences				
with Mr. McKee re continuance;				
studying pleading and civil				
rules re class actions and				
Title VII history re same in				
preparation for filing answer.				
ATTORNEY'S INITIALS & NO. — INITIALS ECK — NUMBER				
TOTAL HOURS			2	0

FORM NO. 2.74

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE T ET

CLIENT Roadway DATE 8/27/75

NAME Monk vs.

CASE NO. B-51-356		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Conferences with Messrs. Gunn,				
McKee and Babb re status of				
default; study complaint and				
preparing answer; lengthy cover				
letter to Mr. McKee explaining				
the answer and theory of				
defenses.				
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		
TOTAL HOURS			3	0

FORM NO. 2.74

606

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE T ET

CLIENT Roadway DATE 8/28/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Meeting with Mr. Gunn				
re facts of three com-				
plaintants charges and editing				
and forwarding answer to				
McKee.				
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		
TOTAL HOURS			2	0

FORM NO. 2.74

607

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway DATE 9/2/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Conference with Mr. Gunn re				
materials to be sent to Mr.				
McKee.				
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		
TOTAL HOURS				.3

FORM NO. 2.74

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway DATE 9/3/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Conference with Mr. Gunn				
re materials to McKee.				
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		
TOTAL HOURS				.3

FORM NO. 2.74

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE T ET

CLIENT Roadway DATE 9/25/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Conference with Mr. McKee re answer he proposes to file.				
ATTORNEY'S INITIALS & NO. INITIALS ECK NUMBER				
TOTAL HOURS				.5

FORM NO. 2.74

610

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE T ET

CLIENT Roadway Express DATE 9/6/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Meeting with Mr. Gunn and conference with Mr. Manitzas re notice to class and effective Cleveland decree.				
ATTORNEY'S INITIALS & NO. INITIALS ECK NUMBER				
TOTAL HOURS				3.0

FORM NO. 2.74

611

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway DATE 10/8/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Conf. with Mr. McKee re interrogatories				
and overall strategy in conflict with				
Southern Conf. case/				
ATTORNEY'S INITIALS & NO.	INITIALS . ECK	NUMBER		
TOTAL HOURS			.5	

FORM NO. 274

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway Express DATE 8-7-75

NAME Monk et al vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
conference with Mr. CONFERENCE		01		
Schober re: representa- TELEPHONE		02		
tion of Roadway in CORRESPONDENCE		03		
Shreveport RESEARCH		04		
FILE REVIEW		05		
				3
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER		3
TOTAL HOURS				

FORM NO. 274

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway DATE 8-6-75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
conferences with Mr. — CONFERENCE		01		
McKee abd Mr. Gunn — TELEPHONE		02		
re: representation of — CORRESPONDENCE		03		
Roadway — RESEARCH		04		
— FILE REVIEW		05		
				7
ATTORNEY'S INITIALS & NO.	INITIALS: ECK	NUMBER:		7
	TOTAL HOURS			

FORM NO. 274

614

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway DATE 8-5-75

NAME Monk et al vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
conferences with Joe — CONFERENCE		01		
Varbel and McKee's — TELEPHONE		02		
office re: identity — CORRESPONDENCE		03		
of atty in Shreveport — RESEARCH		04		
who could represent — FILE REVIEW		05		
Roadway				
			1	0
ATTORNEY'S INITIALS & NO.	INITIALS: ECK	NUMBER:	1	0
	TOTAL HOURS			

FORM NO. 274

615

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE SHEET

CLIENT Roadway Express DATE 8-4-75

NAME Monk et al vs. (Civil Rts)

CASE NO. B-51-346 SUB. NO.

DIARY DETAIL	✓	WORK CODE	HOURS
CONFERENCE		01	
conferences with TELEPHONE		02	
Messrs Collin and CORRESPONDENCE		03	
Tittle re: attornye RESEARCH		04	
in Shreveport to FILE REVIEW		05	
represent Roadway			
			6

ATTORNEY'S INITIALS & NO.	INITIALS	NUMBER	
	ECK		6
TOTAL HOURS			

FORM NO. 2.74

616

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE SHEET

CLIENT Roadway DATE 10/13/75

NAME Monk vs.

CASE NO. B-51-346 SUB. NO.

DIARY DETAIL	✓	WORK CODE	HOURS
CONFERENCE		01	
TELEPHONE		02	
CORRESPONDENCE		03	
RESEARCH		04	
FILE REVIEW		05	
Studying file and interrogatories;			
conference with Mr. Key re strategy			
and interrogatories.			

ATTORNEY'S INITIALS & NO.	INITIALS	NUMBER	
	ECK		
TOTAL HOURS			1.5

FORM NO. 2.74

617

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE T ET

CLIENT Roadway DATE 10/18/75

NAME Monk vs.

CASE NO. B-51-346		SUB. NO.		
DIARY DETAIL	✓	WORK CODE	HOURS	
CONFERENCE		01		
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
Forwarding interrogatories to May with				
questions.				
ATTORNEY'S INITIALS & NO.	INITIALS: ECK	NUMBER:		
TOTAL HOURS				.3

FORM NO. 2.74

618

BUCKINGHAM, DOOLITTLE & BURROUGHS
TIME CHARGE ' ET

CLIENT Roadway -- Monk v. DATE 11/10/75

NAME

CASE NO. B-51		SUB. NO. 346		
DIARY DETAIL	✓	WORK CODE	HOURS	
Conference with Mr. McKee re				
CONFERENCE		01		
interrogatories				.5
TELEPHONE		02		
CORRESPONDENCE		03		
RESEARCH		04		
FILE REVIEW		05		
ATTORNEY'S INITIALS & NO.	INITIALS: ECK	NUMBER:		
TOTAL HOURS				.5

FORM NO. 2.74

619

BUCKINGHAM, DOOLITTLE & BURROUGHS

TIME CHARGE TICKET

CLIENT Roadway Monk vs. DATE 11-28-75

NAME

CASE NO. B-51		SUB. NO. 346		
DIARY DETAIL	✓	WORK CODE	HOURS	
Studying interrogatories with CONFERENCE		01		
respect to decreasing work TELEPHONE		02		
upon Roadway and answering CORRESPONDENCE		03	2	0
RESEARCH		04		
FILE REVIEW		05		
ATTORNEY'S INITIALS & NO.	INITIALS ECK	NUMBER	2	0
TOTAL HOURS				

FORM NO. 2.74

620

B. D. B. TIME TICKET

DATE 1-7-76

CLIENT: Roadway Express Monk vs.	CLIENT NO.	
MATTER (CASE) B-51	SUB. NO. * 346	
Meeting with Mr. Gunn re interrogatories and other developments in Monk case in Shreveport	1	0
ATTORNEY'S INITIALS ECK	ATTORNEY'S NO.	
TOTAL HOURS	1	0

FORM NO. 2.74 NOTE:* USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

621

B. D. B. TIME TICKET

DATE 1-5-76

CLIENT: Roadway
Monk v.

CLIENT NO.

MATTER (CASE) B-51

SUB. NO. * 346

~~Conference with Mr. McKee re~~		
activities in case and settlement		
discussion with Plaintiffs'		
attorney		5

ATTORNEY'S INITIALS: ECK

ATTORNEY'S NO.:

TOTAL HOURS: 5

FORM NO. 2.74 NOTE:* USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

622

B. D. B. TIME TICKET

DATE ~~1-8-76~~

CLIENT: ~~Roadway Express Co.~~
~~EX~~ Monk vs.

CLIENT NO.

MATTER (CASE) ~~B-51~~

SUB. NO. * 346

~~Conferences with Messrs McKee &~~		
~~Gunn re court's insistance on~~		
~~January trail date.~~	1	0

ATTORNEY'S INITIALS: ECK

ATTORNEY'S NO.:

TOTAL HOURS: 1 0

FORM NO. 2.74 NOTE:* USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

623

B. D. B. TIME TICKET

DATE 1-9-76

CLIENT: Roadway Express Inc.	CLIENT NO.
Monk vs.	
MATTER (CASE) B-51	SUB. NO. * 346

Conferences with attorney Schobert		
and with Mr. Gunn re crisis		
involving Curtis McKee's illness	1	5
ATTORNEY'S INITIALS: ECK	ATTORNEY'S NO.	
TOTAL HOURS	1	5

FORM NO. 2.74 NOTE:* USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

624

B. D. B. TIME TICKET

DATE 4-12-76

CLIENT: ~~Roadway Express, Inc.~~	CLIENT NO. B-51
MATTER (CASE) Monk vs.	SUB. NO. * -346

Studying correspondence in Monk		
file and conference with Mr.		
Mc Kee re Monk's letter regarding		
Southern Conference Class	1	0
ATTORNEY'S INITIALS: ECK	ATTORNEY'S NO.	
TOTAL HOURS	1	0

FORM NO. 2.74 NOTE:* USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

625

B. D. B. TIME TICKET

DATE 4-28-76

CLIENT: Roadway Express, Inc.	CLIENT NO. B-51
MATTER (CASE) Monk vs.	SUB. NO. -346

Reviewing Monk file with regard		
to response to make to Judge		
regarding class action in Southern		
Conference		5
ATTORNEY'S INITIALS: ECK	ATTORNEY'S NO.	
TOTAL HOURS		5

FORM NO. 2.74 NOTE: USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

626

B. D. B. DAILY TIME TICKET

DATE 5-12-76

CLIENT: Roadway Express, Inc.	CLIENT NO. B-51
MATTER (CASE) Monk vs.	SUB. NO. -346

Conference with Mr. McKee re		
efforts to pin plaintiffs down and		
to get their counsel to withdraw		
from case.		5
ATTORNEY'S INITIALS: ECK	ATTORNEY'S NO.	
TOTAL HOURS		5

FORM NO. 2.74 NOTE: USE THIS SUB CODE SPACE ONLY IF THE CLIENT IS TO BE BILLED BY THIS SUB NUMBER

627

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

(Caption Omitted in Printing)

Affidavit

Now comes Daniel M. Gunn, the undersigned, being first duly sworn, states that he is Vice President of Employee and Labor Relations for Roadway Express, Inc., and states further as follows:

While specific records were not maintained on a day to day basis, it is my estimate that time and materials necessary to respond to this litigation were as follows:

1) As corporate officer responsible for this area of activity, I personally expended a minimum of two (2) weeks (80) hours in coordinating the Company's defense. Involved time included consultation with both general counsel and local counsel in the development of pleadings and other legal matters, as well as supervision of the research and preparation of responses to plaintiffs' interrogatories.

2) Field and general office personnel were involved in the research and preparation of responses to the interrogatories to the extent that a minimum of 40 hours supervisory and clerical time was necessary to accomplish same.

3) Additional expense was incurred in the reproduction of copies of Company records, as well as pro-

EXHIBIT C

duction as necessary of multiple copies of pleadings and responses to interrogatories. Additional expense was incurred by reason of necessary telephone conversations between counsel and Company personnel.

4) It is estimated that a minimum of two (2) weeks (80) hours secretarial and clerical time was expended in dictation, typing, and the organization and filing of material pertinent to this litigation.

It is my estimate that the time and materials necessary to the defense of this litigation represent a total minimum cost of $5,000.00.

/S/DANIEL M. GUNN
Daniel M. Gunn

(Subscription Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

CIVIL ACTION
NO. 75-0548-S

J. D. MONK, *Et Al*
Plaintiffs

vs.

ROADWAY EXPRESS, INC., *Et Al*
Defendants

Affidavit of John L. Schober, Jr., in Support of the Defendants' Request for Attorneys' Fees and Expenses

STATE OF LOUISIANA
PARISH OF CADDO } SS.:

BEFORE ME, the undersigned authority, personally came and appeared JOHN L. SCHOBER, JR., who deposed and stated:

That Affiant is a member of the Law Firm of Fiest, Schober & Howell, 806 Mid South Towers, Shreveport, Louisiana. Affiant was contacted by Messrs. Edward C. Kaminski, General Counsel for Roadway Express, Inc., and M. Curtiss McKee, attorney at law of the Law Firm of Fuselier, Ott, McKee & Flowers, Jackson, Mississippi, in connection with the above cause. Both counsel requested that Affiant consent to be associated as local counsel in the representation of the defendant, Roadway Express, Inc., in said cause. These contacts were made on August 7, 1976.

EXHIBIT D

There is annexed hereto and made a part hereof a copy of the statement rendered by the Law Firm of Feist, Schober & Howell to Roadway Express, Inc. dated July 7, 1976. That the original of such statement for services and expenses has actually been forwarded to Roadway Express, Inc. for payment. That the itemizations contained in the annexed statement accurately reflect the services rendered and the time and expenses expended in connection with this representation.

Affiant well and truly believes that all of the charges reflected on the annexed statement were reasonable and necessary for proper representation of the defendant, Roadway Express, Inc., and said charges are in accordance with customary fees in Shreveport, Louisiana. The total amount of fees and expenses charged by this firm to Roadway Express, Inc. in connection with this litigation, as reflected on the annexed bill, are in the full amount of $5,140.80.

/S/JOHN L. SCHOBER, JR.
John L. Schober, Jr.

SWORN TO AND SUBSCRIBED before me, Notary, at Shreveport, Louisiana, on this 8th day of July, 1976.

/s/JOE CORDILL, JR.
NOTARY PUBLIC in and for
Caddo Parish, LA.

SHREVEPORT, LA. July 7, 1976

Roadway Express, Inc.
c/o Mr. M. Curtiss McKee
2100 Deposit Guaranty Plaza
Jackson, Mississippi 39201

In Account With

FEIST, SCHOBER & HOWELL
Attorneys at Law
Mid South Towers
Shreveport, Louisiana 71101

To Professional Services Rendered and Expenses Incurred:

Re: J. D. Monk, et al v. Roadway Express, Inc., et al.

Aug. 7, 1975	—Two telephone conferences with Mr. Edward C. Kaminski, General Counsel for Roadway Express, Inc.; Telephone conference with Mr. M. Curtiss McKee.
Aug. 9, 1975	—Receipt and review of original complaint.
Aug. 11, 1975	—Review and preliminary legal research.
Aug. 19, 1975	—Telephone conference with Mr. McKee.
Aug. 21, 1975	—Telephone conferences with Mr. McKee; Attempts to contact Mr. Robert Piper, Jr. by telephone; Dictation and preparation of letter to Mr. Piper.
Aug. 22, 1975	—Legal Research; Preparation

Aug. 25, 1975	—of Motion for extension of time within which to plead and Memorandum Brief in support of said Motion.
Aug. 26, 1975	—Telephone conferences with Mr. McKee and filing of Motion and Brief for extension of time within which to plead.
Aug. 27, 1975	—Telephone conferences with Mr. McKee; Preparation of Motion to set aside entry of default and affidavit in support of said Motion; Filing of Motion; Dictation and preparation of a joint Stipulation and Order to set aside a preliminary default and an extension of time within which to plead and delivery thereof with transmittal letter to Mr. Piper.
Aug. 29, 1975	—Receipt and review of proposed answer prepared by Mr. Kaminski; Telephone conference with Mr. McKee.
Sept. 2, 1975	—Preparation and obtaining of Order from Hon. Ben C. Dawkins, Jr., District Judge, vacating default judgment and enlargement of time in which to plead; Dictation and preparation of letter to Mr. Kaminski and Mr. McKee forwarding Motions, Stipulations and Order; Dictation and preparation of letter to Mr. McKee regarding proposed answer to be filed to the original complaint.
Sept. 27, 1975	—Receipt and review of answer to original complaint from Mr. McKee.

Sept. 30, 1975 —Filing of answer to original complaint.

Oct. 8, 1975 —Telephone conferences with Messrs. McKee and Kaminski.

Oct. 13, 1975 —Telephone conference with Mr. McKee.

Nov. 11, 1975 —Telephone conferences with Mr. McKee regarding answers to interrogatories propounded by plaintiffs.

Nov. 13, 1975 —Legal Research; Filing of Motion for enlargement of time within which to answer interrogatories.

Nov. 14, 1975 —Obtaining of Order from Hon. Ben C. Dawkins, Jr., Senior Judge, granting said Motion.

Nov. 18, 1975 —Receipt and review of answer filed by Messrs. Mullinax, Wells, Mauzy & Baab, counsel for Teamsters Local 568.

Nov. 19, 1975 —Dictation and preparation of letter to Mr. McKee forwarding copies of Motions and copy of answer from Local 568.

Dec. 22, 1975 —Transmittal of trial and Pretrial Calendar to all counsel.

Dec. 29, 1975 —Telephone conferences with Messrs. McKee and Kaminski.

Dec. 31, 1975 —Telephone conference with Mr. McKee.

Jan. 2, 1975 —Telephone conferences with Messrs. McKee and Kaminski.

Jan. 5, 1976 —Preparation of Motion and Order for continuance or Pretrial and Trial; Conference in Shreveport with Mr. McKee and Messrs. Piper and Brown.

Jan. 6, 1976 —Filing of Motion and Order for continuance; Motion and Order denied; Transmittal of Motion and Order to Mr. Kaminski; Conference with Mr. McKee in Shreveport.

Jan. 8, 1976 —Several conferences with the office of Mr. McKee regarding Mr. McKee's illness and inability to appear for pre-trial or trial; telephone conferences with Mr. Kaminski.

Jan. 9, 1976 —Telephone conferences with Judge Dawkin's office and Mr. Robert Piper regarding continuance; Telephone conferences with Mr. Kaminski.

Feb. 5, 1976 —Telephone conferences with Mr. McKee.

Mar. 17, 1976 —Telphone conferences with Messrs. McKee and Kaminski.

Mar. 22, 1976 —Telephone conferences with Messrs. McKee and Kaminski.

Mar. 27, 1976 —Legal Research; Filing of Motion and Order to compel plaintiffs to answer interrogatories propounded by defendant, Roadway Express, Inc.

Apr. 7, 1976 —Telephone conference with Mr. McKee.

Apr. 8, 1976 —Telephone conference with Mr. McKee.

Apr. 13, 1976 —Preparation and obtaining of order from United States Magistrate ordering plaintiffs to show cause why they should not be compelled to answer the interrogatories propounded by Roadway Express, Inc. and to show cause why

sanctions should not be imposed; Dictation and preparation of Notice of taking depositions of all plaintiffs.

Apr. 14, 1976 —Filing of Notice of taking of depositions of all three plaintiffs.

Apr. 21, 1976 —Legal Research; Two appearances before United States Magistrate on rule to show cause and obtaining order compelling answers to interrogatories by May 24, 1976; Conference with Mr. Piper regarding scheduling of depositions.

Apr. 22, 1976 —Dictation and preparation of letter to Mr. Piper regarding depositions.

Apr. 27, 1976 —Receipt and review of Motion to Dismiss or, Alternatively, Motion for Summary Judgment, Notice of Motion, Affidavit of Mr. Daniel N. Gunn, Memorandum of Authorities in Suport of Motion to Dismiss or, Alternatively, Motion for Summary Judgment; Legal Research; Filing of said Motion, Notice and Memorandum.

May 4, 1976 —Two telephone conferences with Mr. McKee regarding depositions; Telephone conference with Mr. Piper.

May 5, 1976 —Dictation, preparation and hand delivery of letter to Mr. Piper concerning depositions; Conference in Shreveport with Mr. McKee.

May 6 & 7, 1976 —Taking of depositions of two plaintiffs in Shreveport, Louisiana.

May 10, 1976 —Telephone conference with Mr. McKee.

May 12, 1976 —Receipt and review of Motion to Dismiss the claim of plaintiff McPherson for failure to appear at deposition, Affidavit of John L. Schober, Jr., Affidavit of Joe Cordill, Jr., Memorandum in Support of Motion to Dismiss McPherson's claim.

May 14, 1976 —Two telephone conferences with Mr. McKee; Preparation of letter to Judge Dawkins, and filing of Motions and Affidavits delineated above.

June 2 & 3, 1976 —Preparation of Motions and rule to show cause why the complaints of the plaintiffs should not be dismissed for failure to timely answer interrogatories with supporting memoranda; Telephone conference with Mr. McKee.

June 4, 1976 —Filing of said Motions.

June 11, 1976 —Telephone conference with Mr. McKee.

June 14 & 15, 1976 —Receipt and review of depositions; Legal research; Telephone conference with Mr. McKee.

June 16, 1976 —Transmittal of depositions to Mr. McKee.

June 18, 1976 —Telephone conference with Mr. McKee.

TOTAL HOURS TO JUNE 18, 1976 - 91½ hours

June 24, 1976 —Receipt and review of Motion for Continuance of rule to show cause filed by plaintiffs; Telephone conference with Mr. McKee.

June 29, 1976 —Conference in Shreveport between Messrs. McKee, Cordill and Schober and legal research.

June 30, 1976 —Court appearance for oral argument of Motions to dismiss the complaint of all three plaintiffs for failure to answer interrogatories and for the imposition of sanctions and Motion to Dismiss complaint of plaintiff McPherson for failure to appear at deposition; Entry of Order dismissing plaintiffs' complaints without prejudice; Defendants' counsel given ten days to enter memoranda and data concerning sanctions.

ATTORNEYS FEE through June 18, 1976 91½ hours at $50.00 per hour	$4,575.00
ATTORNEYS FEE June 19 through June 30, 1976—9½ hours at $50.00 per hour	475.00
TOTAL ATTORNEYS FEE	5,050.00

EXPENSES incurred through June 18, 1976

Long Distance Calls	$ 62.80
Xeroxing costs	28.00
	90.80
TOTAL	$5,140.80

THERE IS NO PRINTED APPENDIX IN THIS CASE. A JOINT MOTION TO DISPENSE WITH THE PRINTING O OF THE RECORD WAS MADE AND GRANTED.

Supreme Court, U. S.
FILED
NOV 30 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL,
Respondents

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

HERSCHEL E. RICHARD, JR.
COOK, CLARK, EGAN, YANCEY & KING
600 Commercial National Bank Bldg.
Shreveport, Louisiana 71101
(318) 221-6277

Counsel for Respondents

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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TABLE OF CASES AND AUTHORITIES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL,
Respondents

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

The respondents, Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 599 F.2d 1378. (App A, infra).

QUESTION PRESENTED

Whether "excess costs" which may be assessed against an attorney pursuant to 28 U.S.C. § 1927 may include attorneys' fees?

STATUTE INVOLVED

28 U.S.C. § 1927 provides:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexaciously may be required by the Court to satisfy personally such excess costs."

STATEMENT OF THE CASE

J. D. Monk, Percy Green, and Robert McPherson, represented by attorneys Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile, respondents herein, filed suit against Roadway Express, Inc. (Roadway) and Local #194 of the International Brotherhood of Teamsters alleging racial discrimination. During the discovery process, Roadway moved to dismiss the complaint of McPherson for failure to give his deposition and moved to dismiss the remainder of the complaint, with prejudice, for failure to answer interrogatories. On June 30, 1976, the District Court dismissed the case without prejudice but retained jurisdiction to determine whether defendants were entitled to an award of expenses, costs and attorneys' fees. On January 6, 1977, the District Court awarded certain costs, attorneys' fees and expenses taxed against the respondents.

The Fifth Circuit Court of Appeals found that the district court's determination concerning the vexaciousness of the appellants' behavior was not clearly erroneous but did determine that attorneys' fees could not be considered part of the "excess costs" under 28 U.S.C. § 1927. Accordingly, the Court of Appeals vacated the judgment of the district court and remanded the case for further proceedings consistent with its opinion. The Court noted that § 1927 provided only for "excess costs" caused by the plaintiffs attorneys' vexacious behavior and consequent multiplication of the proceedings, and not for the total cost of the litigation. 599 F.2d at 1383 (App. A, p. 8a).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision Below Does Not Conflict With The Decisions Of Other Courts of Appeals Which Have Thoroughly Considered And Discussed Whether Attorneys' Fees Can Be Assessed Under 28 U.S.C. § 1927.

Roadway contends that the decision in *Browning Debentures Holders' Comm.* v. *DASA Corp.*, 560 F.2d 1078 (2nd Cir., 1977) is in conflict with the decision below by the Fifth Circuit. The Court in *Browning Debentures* assumed, without discussion, that attorneys' fees could be assessed under § 1927. 560 F.2d at 1089. The trial court's opinion in that case, *Browning Debentures, etc.* v. *DASA Corp.*, 431 F.Supp. 959 (S.D.N.Y. 1976) makes no reference to assessing attorneys' fees pursuant to § 1927. The district court assessed fees under its "equitable power." 431 F.Supp. at 966. It is apparent that the question of whether attorneys' fees may be assessed under § 1927 was not fully addressed by either the district court of the Court of Appeals.[1] Moreover, the decision cited by the Second

[1] It should also be noted that Bradley R. Brewer, plaintiffs' counsel, against whom fees were assessed, was an owner of debentures along with Sims R. Browning and was actually a party at interest in the litigation. 431 F.Supp. at 960 n.2.

Circuit in *Browning Debentures* as authority for an award of attorneys' fees under § 1927, *Acevedo* v. *Immigration and Naturalization Service,* 538 F.2d 918 (2nd Cir. 1976), does not deal with an award of attorneys fees, but rather involves an award of double costs under 28 U.S.C. § 1912 and F.R.A.P. 28. 538 F.2d at 921.

The other decision relied on by applicant, *Asai* v. *Castillo,* 593 F.2d 1222 (D.C. Cir. 1979) does not discuss the issue in question. In fact it is difficult to determine if that case actually stands for the proposition that attorneys' fees may be awarded under § 1927. The Court denied the motion for costs and attorneys' fees requested under the authority of Federal Rules of Appellate Procedure 20 and 38 and 28 U.S.C. § 1927.

Clearly, then, this action does not present an issue ripe for adjudication on writ of certiorari, for the decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of another Court of Appeals that has thoroughly discussed the same matter. Accordingly, the criteria suggested in Rule 19 (1)(b) of the Rules of the Supreme Court of the United States for review on writ of certiorari are absent.

2. The Decision Below Fully Considered Whether Attorneys' Fees Could Be Awarded Pursuant To 28 U.S.C. § 1927 And Correctly Decided The Issue.

Contrary to the opinions in *Browning Debentures,* supra, and *Asai,* supra, the Fifth Circuit in the instant case fully considered the issue which is raised by Roadway. The Court, citing *United States* v. *Ross,* 535 F.2d 346 (6th Cir., 1976), stated that § 1927 should be strictly construed since it is penal in nature. 599 F.2d

at 1382. (App. A, p. 6a). In this connection the court noted:

> "We agree with the Sixth Circuit in its observations that § 1927 should be strictly construed because it is penal in nature. *United States* v. *Ross,* 535 F.2d at 350. To read § 1927's provision for 'costs' as including an award of attorneys' fees 'would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction,' as the Supreme Court was urged to do in construing the provision for 'costs' in § 35 of the Lanham Act. *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475 (1967). The Court's observations in that case bear repeating in our endeavor to divine the Congressional intent underlying § 1927's provision for the assessment of costs against attorneys. 'When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." Id. at 720, 87 S.Ct. at 1408. Since 'attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor,' id. at 717, 87 S.Ct. at 1407, and since § 1927's provision for assessment of costs against attorneys is an extraordinary remedy, we conclude, as did the Supreme Court with regard to § 35 of the Lanham Act, that '(a) judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context,' id. at 721, 87 S.Ct. at 1409." 599 F.2d at 1382.

Finally, the Court further held that § 1927 could not be combined with 42 U.S.C. §§ 1988 and 2000 e-5(K) to "produce a hybrid result contemplated by none of the statutes." 599 F.2d at 1383. (App. A, p. 8a).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

No. 77-2067

J. D. MONK et al., *Plaintiffs,*

v.

ROADWAY EXPRESS, INC., et al., *Defendants-Appellees,*
ROBERT E. PIPER, JR., et al., *Movants-Appellants.*

August 3, 1979

Appeal from the United States District Court for the Western District of Louisiana.

Before TUTTLE, TJOFLAT and HILL, Circuit Judges.

JAMES C. HILL, Circuit Judge:

In this case we examine the propriety of assessing attorneys' fees under 28 U.S.C. § 1927 and 42 U.S.C. §§ 1988, 2000e-5(k)[1] against the plaintiffs' attorneys in a Title VII

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[1] 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. § 1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000e-5(k) provides:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

case. Finding that the three statutes relied on by the district court do not support the assessment of attorneys' fees against attorneys, we vacate that portion of the district court's judgment which awards attorneys' fees to the defendants at the plaintiffs' attorneys' expense, and we remand to the district court for modification of the judgment to reflect only the excess costs caused by the plaintiffs attorneys' conduct.

On June 3, 1975, J. D. Monk, Percy Green, and Robert McPherson, individually and on behalf of other similarly situated, filed suit against Roadway Express, Inc. (Roadway) and Local Union No. 194 of the International Brotherhood of Teamsters for racial discrimination. The plaintiffs were represented by Robert C. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile, the appellants in the instant case.

On September 5, 1975, the plaintiffs commenced discovery by propounding interrogatories to Roadway. Roadway's motion for enlargement of time within which to answer interrogatories was filed and granted on November 14, 1975. On January 5, 1976, Roadway answered the plaintiffs' interrogatories and simultaneously propounded interrogatories to the plaintiffs. Roadway filed a motion on April 13, 1976, for an order compelling the plaintiffs to answer their interrogatories. A hearing on the motion was scheduled for 10:00 a. m. on April 22, 1976, but the plaintiffs' attorneys failed to appear, requiring the hearing to be rescheduled for 3:00 p. m. on the same day. Following the hearing, the magistrate ordered the plaintiffs to answer the interrogatories on or before May 24, 1976.

At the same time that it had filed a motion to compel, Roadway had noticed depositions of each of the plaintiffs to be taken on May 6 and 7, 1976. The depositions of Monk and Green were taken, but McPherson could not be located by his attorney and his deposition was not taken.

The plaintiffs' lack of cooperation in the defendants' pretrial discovery efforts led Roadway to file two motions

to dismiss. On May 18, 1976, Roadway moved to dismiss McPherson's complaint for failure to give his deposition, and on June 14, 1976, Roadway moved to dismiss the complaint of the plaintiffs, with prejudice, for failure to answer interrogatories. On June 16, 1976, the district court ordered the plaintiffs to show cause why their complaint should not be dismissed, with prejudice, and why they should not be taxed with all of the defendants' reasonable expenses, costs, and attorneys' fees. Pursuant to a hearing on the order, the district court dismissed the case without prejudice on June 30, 1976, but retained jurisdiction to determine whether the defendants were entitled to an award of expenses, costs, and attorneys' fees.

On October 5, 1976, the district court held an evidentiary hearing on the imposition of sanctions and/or the taxation of costs and attorneys' fees against the plaintiffs and their counsel. On January 6, 1977, the district court ordered certain costs, attorneys' fees, and expenses taxed against the plaintiffs' attorneys on the grounds that their conduct was deliberate and vexatious in that they failed to diligently pursue the plaintiffs' interests and abide by the Federal Rules of Civil Procedure. The court found that the forced dismissal of the plaintiffs' claims was caused by the total and deliberate failure of their counsel to properly prosecute them, as evidenced by their failure to answer Roadway's interrogatories as ordered; their failure to produce McPherson for his deposition as previously agreed; their failure to advise their clients of their denomination as class representatives and the possible consequences of class representation; and their failure to file briefs twice requested by the court concerning this case's relation to a class action certification entered in the Western District of Texas. A motion for a rehearing on the motion to assess attorneys' fees and costs against the plaintiffs' attorneys was filed and denied. The plaintiffs' attorneys, Piper, Brown, and Stromile, appeal from the judgment against them in the amount of $17,372.53 for the attorneys' fees and costs incurred by Roadway in defending the law suit.

The appellants contend first that the district court erroneously assessed attorneys' fees against them under 28 U.S.C. § 1927 and 42 U.S.C. §§ 1988, 2000e-5(k), since § 1927 refers only to "excess costs" and §§ 1988 and 2000e-5(k) are applicable only to parties. They next contend that their conduct was not vexatious so that no award of costs under § 1927 should have been entered against them.

Looking first to the propriety of entering any award at all against the appellants under § 1927, we find that the district court's determinations regarding the vexatiousness of the appellants' behavior are not clearly erroneous. *See United States v. National Ass'n of Real Estate Boards,* 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007 (1950); Fed.R.Civ. P. 52(a). The instances of misconduct related in the district court's ruling on the motion to assess costs and attorneys' fees adequately support the court's findings of fact concerning the vexatious manner in which the appellants conducted the law suit. Thus, under § 1927, the appellants are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings. Having determined that the appellants are liable for an award under § 1927, we turn to the proper scope of their liability.

The general American rule is that attorneys' fees are not ordinarily recoverable as costs. *E. g., Mills v. Electric Auto-Lite Co.,* 396 U.S. 375, 391, 90 S.Ct. 616, 24 L.Ed.2d 593 (1969). Section 1927's reference to "costs" neither specifically includes nor specifically excludes attorneys' fees as allowable costs under the statute. Our research reveals a split among circuits concerning the correct construction of § 1927 and the scope of allowable costs under the statute.

The Second Circuit indicated clearly in *Browning Debenture Holders' Committee v. DASA Corp.,* 560 F.2d 1078, 1087-89 (2d Cir. 1977), that, where an attorney has been vexatious in increasing costs through improper motions,

actions, or delays, he may be assessed, under § 1927, the "expenses, costs, and attorneys' fees reasonably incurred by the opposing party or parties in meeting such improper motions, action, or delays." Although the District of Columbia Circuit did not address the question as directly as did the Second Circuit, a recent case from the District of Columbia Circuit suggests that that circuit would rule similarly were it faced with a case where the attorney had acted vexatiously. *See Asai v. Castillo,* 193 U.S.App.D.C. 68, 593 F.2d 1222 (1979). In addition, several cases at the district court level have allowed attorneys' fees as part of a § 1927 award against an attorney. *Nemeroff v. Abelson,* 469 F. Supp. 630 (S.D.N.Y.1979); *North American Foreign Trading Corp. v. Zale Corp.,* 77-C-1056 (S.D.N.Y.1979); *Wheeler v. Anchor Continental, Inc.,* 19 Empl.Prac.Dec. (CCH) ¶ 9006 (D.S.C.1978); *In re Complaint of Cosmopolitan Shipping Co.,* F.Supp. (slip op. issued 12-26-78) (S.D.N.Y. 1978).

On the other hand, the Sixth Circuit, in *United States v. Ross,* 535 F.2d 346, 350-51 (6th Cir. 1976), concluded that the "costs" provided by § 1927 should be limited to taxable costs, recognizing in the course of that determination that attorneys' fees cannot be part of those costs. The Seventh Circuit had reached the same conclusion earlier in *1507 Corp. v. Henderson,* 447 F.2d 540, 542 (7th Cir. 1971). Three district courts, two of which are in this circuit, have since followed suit. *See Yarborough v. Texas Oklahoma Express, Inc.,* 86 Lab.Cas. (CCH) ¶ 11,256 (N.D.Tex.1979); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.,* 78 F.R.D. 192 (E.D.La.1978); *Chrysler Corp. v. Lakeshore Commercial Finance Corp.,* 389 F.Supp. 1216 (E.D.Wis. 1975), *aff'd,* 549 F.2d 804 (7th Cir. 1977). In addition, the First Circiut, while not having clearly addressed the issue, suggests that attorneys' fees are not allowable in a § 1927 award, *see Bonsukan v. Immigration and Naturalization Service,* 554 F.2d 2, 4 (1st Cir.), *cert. denied,* 434 U.S. 833,

98 S.Ct. 118, 54 L.Ed.2d 93 (1977), and a fourth district court reaches the same result in construing similar statutory provisions for awards of costs, *see Lockett v. Hellenic Sea Transports Ltd.*, 60 F.R.D. 469 (E.D.Pa.1973).

We agree with the Sixth Circuit in its observations that § 1927 should be strictly construed because it is penal in nature. *United States v. Ross,* 535 F.2d at 350. To read § 1927's provision for "costs" as including an award of attorneys' fees "would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislaitve history to support the unusual construction," as the Supreme Court was urged to do in construing the provision for "costs" in § 35 of the Lanham Act. *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 720, 87 S.Ct. 1404, 1408, 18 L.Ed.2d 475 (1967). The Court's observations in that case bear repeating in our endeavor to divine the Congressional intent underlying § 1927's provision for the assessment of costs against attorneys. "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Id.* at 720, 87 S.Ct. at 1408. Since "attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor," *id.* at 717, 87 S.Ct. at 1407, and since § 1927's provision for assessment of costs against attorneys is an extraordinary remedy, we conclude, as did the Supreme Court with regard to § 35 of the Lanham Act, that "[a] judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context," *id.* at 721, 87 S.Ct. at

1409.[2] We thus hold that the district court's inclusion of attorneys' fees in the award of costs, pursuant to § 1927, against the appellants was erroneous, and we vacate that portion of the judgment.

Our construction of § 1927 does not foreclose assessment of attorneys' fees against attorneys in every conceivable situation, it merely forecloses the imposition of such liability under § 1927. Moreover, new legislation specifically providing for such assessments can, of course, be enacted at Congress' will.

We note that the district court's reliance on 42 U.S.C. §§ 1988 and 2000e-5(k) in assessing attorneys' fees against the appellants does not alter the result in this case. Those sections provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless in allowing awards against unsuccessful *plaintiffs. See, e. g., Christiansburg*

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[2] We acknowledge that a panel of this circuit affirmed the assessment of jury expenses under § 1927 in *Harrell v. Joffrion,* 73 F.R.D. 267, 268 (W.D.La.), *aff'd without opinion,* 545 F.2d 167 (5th Cir. 1976). We point out, however, that the judgment in *Harrell v. Joffrion* was affirmed pursuant to Local Rule 21. Under that rule, the panel to whom the case is submitted must determine that an opinion in the case would have no precedential value before the rule is triggered. Given that fact, in conjunction with the fact that the basis for a Rule 21 affirmance is never subjected to the scrutiny of the entire court as are published opinion which are circulated among the court prior to their release, we are doubtful that a district court opinion affirmed without opinion pursuant to Rule 21 is Fifth Circuit authority to which we are bound in our ensuing opinion. Even if we were bound by *Harrell v. Joffrion,* we would decline to expand § 1927 further to include attorneys' fees.

Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed. 2d 648 (1978); *Little v. Southern Electric Steel Co.,* 595 F.2d 998 (5th Cir. 1979). Nothing in the language of those statutes and nothing in the cases cited to us by the appellees leads us to believe that §§ 1988 and 2000e-5(k) authorize the imposition of attorneys' fees against an unsuccessful party's attorneys. Neither could the district court combine the provisions of those statutes with those of § 1927 to produce a hybrid result contemplated by none of the statutes.

In conclusion, we vacate the judgment of the district court and remand for determination of a proper award consistent with this opinion. We point out in closing that § 1927 provides only for *excess* costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.

VACATED and REMANDED.

Supreme Court, U.S.
FILED
FEB 20 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-8a) is reported at 599 F.2d 1378. The opinion of the district court on rehearing (Pet. App. C, pp. 11a-13a) is not reported. The opinion of the district court (Pet. App. D, pp. 14a-96a) is reported at 73 F.R.D. 411.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of certiorari was filed on October 31, 1979, and was granted on January 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

Section 706(k) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 1988 (as amended 1976) provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

QUESTION PRESENTED

Whether attorneys who unreasonably and vexatiously multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 may be personally assessed, pursuant to 28 U.S.C. § 1927, with attorneys' fees as part of the "excess costs" incurred by an opposing party as a result of such conduct?

STATEMENT OF THE CASE

I. Facts

On June 3, 1975, attorneys Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile filed a class action on behalf of three individuals against Roadway Express, Inc., the International Brotherhood of Teamsters, and Teamsters Local No. 194. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to -17 (as amended 1972), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (R. 1).

Roadway subsequently moved to dismiss the complaint because of the plaintiffs' failure to make discovery and failure to comply with an order of the court (R. 343). On June 30, 1976, the district court dismissed the complaint,[1] without prejudice, pursuant to Rule 37 of the Federal Rules of Civil Procedure (R. 704). The district court retained jurisdiction, however, to determine whether further sanctions, namely Roadway's costs, would be imposed (*Id.*).

II. The Decision of the District Court

On January 6, 1977, after an evidentiary hearing, the district court awarded Roadway a portion of its costs,

[1] No appeal was taken from the district court's dismissal of the complaint.

including attorneys' fees, and assessed those costs personally against attorneys Piper, Brown, and Stromile (Pet. App. D, at pp. 15a-28a). In support of the assessment, the district court found that the three attorneys' misconduct[2] during the case had unreasonably and vexatiously multiplied the proceedings, and thereby had "escalated defendants' costs substantially" (Pet. App. D, at p. 19a).

The assessment was made pursuant to 28 U.S.C. § 1927, which the district court viewed as providing for "an equitable shifting of responsibility for unreasonable and vexatious costs from a party to his counsel" (Pet. App. D, at p. 24a). The term "costs" was read by the district court as including "only such costs as normally would be allowed to the prevailing party" (Pet. App. D, at p. 23a). This reading thus encompassed the language of Title VII's section 706(k), 42 U.S.C. § 2000e-5(k), and 42 U.S.C. § 1988 (as amended 1976), both of which provide that the court may "allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in actions under the 1866 and 1964 civil rights acts.

[2] As later summarized by the court of appeals, the district court

> found that the forced dismissal of the plaintiffs' claims were caused by the total and deliberate failure of their counsel to properly prosecute them, as evidenced by their failure to answer Roadway's interrogatories as ordered; their failure to produce [plaintiff] McPherson for his deposition as previously agreed; their failure to advise their clients of their denomination as class representatives and the possible consequences of class representation; and their failure to file briefs twice requested by the court concerning this case's relation to a class certification entered in the Western District of Texas.

(Pet. App. A, at p. 4a)

On April 13, 1977, the district court denied a motion for rehearing[3] filed on behalf of the three attorneys by their malpractice insurer (Pet. App. C, at pp. 12a-13a). On May 5, 1977, the district court entered a judgment in favor of Roadway against attorneys Piper, Brown and Stromile (R. 790). On May 25, 1977, the judgment was amended to reflect the district court's dismissal, with prejudice, of Roadway's claim for costs, including attorneys' fees, against the individual plaintiffs. (Pet. App. B, at pp. 9a-10a).

III. The Decision of the Court of Appeals

A panel of the United States Court of Appeals for the Fifth Circuit concluded that the district court's findings of fact were not clearly erroneous, and agreed that under section 1927 the three attorneys "are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings" (Pet. App. A, at pp. 4a-5a). The court of appeals disagreed, however, with the district court's inclusion of attorneys' fees in the assessment.

First, recognizing that "[t]he general American rule is that attorneys' fees are not ordinarily recoverable as costs" (Pet. App. A, at p. 5a), the court of appeals observed that "[s]ection 1927's reference to 'costs' neither specifically includes nor specifically excludes attorneys' fees as allowable costs under the statute" (*Id.*). Additionally, since the statute was considered penal in nature, the court held that section 1927 should be strictly construed (*Id.*). Relying on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), the court of appeals stated that it would not imply what was termed "an extraordinary

[3] Although the district court denied the motion, the court's January 6, 1977, opinion was amended to reflect that the plaintiffs' attorneys had filed a brief which the court incorrectly had stated was not filed (Pet. App. C, at pp. 12a-13a).

remedy" (Pet. App. A, at p. 7a) from section 1927 in the absence of statutory language or legislative history indicating that the costs provided for in the statute were intended to include attorneys' fees.

Second, the court of appeals held that the costs provisions of Title VII's section 706(k) and 42 U.S.C. § 1988 are inapplicable to attorneys. "Those sections provide for attorneys' fees awards against unsuccessful *parties* to a suit, and they focus on actions which are frivolous, unreasonable, and baseless in allowing awards against unsuccessful *plaintiffs*" (Pet. App. A, at p. 8a) (emphasis in original). Finally, the court of appeals concluded that "[n]either could the district court combine the provisions of those statutes with those of § 1927 to produce a hybrid result contemplated by none of the statutes" (*Id.*). The judgment of the district court was vacated insofar as it included attorneys' fees in the section 1927 assessment and the case was remanded for a determination of a "proper award" (*Id.*).

SUMMARY OF ARGUMENT

I.

Sections 1927, 706(k) and 1988 should be enforced according to their plain meaning. Section 1927 provides that "in any case" attorneys may be assessed with "costs." H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947) (1948 amendments to section 1927), *citing Motion Picture Patents Co. v. Steiner*, 201 F. 63, 64-65 (2d Cir. 1912) (section 1927 "costs" are limited to expenses "taxable as costs"). Sections 706(k) and 1988 provide that attorneys' fees may be allowed to the prevailing party "as part of the costs" in Title VII and 42 U.S.C. § 1981 actions. *Hutto v. Finney*, 437 U.S. 678, 696-97 (1978) (attorneys' fees awarded pursuant to section 1988 are "taxable costs"). Consequently, attorneys' fees may be included in an assessment of "costs" pursuant to section 1927 in Title VII and 42 U.S.C. § 1981 actions.

II.

Assuming that the attorneys' fees provisions in sections 706(k) and 1988 are inapplicable to section 1927, an assessment of "costs" under section 1927 may nevertheless include attorneys' fees. First, courts possess inherent equitable power to assess "costs of litigation other than the conventional taxable costs." *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939). Second, courts possess inherent power to impose reasonable and appropriate sanctions on attorneys. In all cases the choice of sanctions is committed to the sound discretion of the district court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 472 U.S. 639 (1976) (per curiam), and, particularly in situations involving attorneys, the range of discretion accorded the district court must be wide. The district court's inclusion of attorneys' fees in the sanctions imposed on the attorneys in the instant case was a reasonable and appropriate exercise of its discretion.

ARGUMENT

I.

28 U.S.C. § 1927, 42 U.S.C. § 2000e-5(k) AND 42 U.S.C. § 1988 SHOULD BE ENFORCED ACCORDING TO THEIR PLAIN MEANING

The plain meaning of the statutes involved in this case compels the result reached by the district court. Section 1927 provides that "costs" may be assessed against attorneys "in any case." Sections 706(k) and 1988 provide

that attorneys' fees may be allowed to the prevailing party "as part of the costs" in actions under Title VII and 42 U.S.C. § 1981. Therefore, since attorneys' fees were "part of the costs" in this case, the district court's inclusion of counsel fees in the assessment of "costs" against the three attorneys was correct.

Statutes should be enforced according to their plain meaning. *E.g., United States v. American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940); *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 277 (1929); *Caminetti v. United States*, 242 U.S. 470, 485 (1917). *See generally* 2A Sutherland Statutory Construction § 46.01 (C. Sands ed. 1973). The court of appeals ignored this rule, and thereby reached a result which defies logic, substantially neutralizes the deterrent effects of section 1927, and does serious violence to the spirit and congressional intent underlying sections 706(k) and 1988.

The best argument for adhering to the plain meaning rule in this case is found in the exception to the rule. That is, statutes will not be enforced according to their plain meaning when to do so would produce "absurd or futile results" or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Ass'ns., supra*, 310 U.S. at 543. The exception is clearly absent from this case, and an analysis of the reasons for its absence provides valuable insight into the infirmities of the court of appeals' holding.

The net result of the district court's enforcement of the plain meaning of the statutes was to require the three attorneys to reimburse Roadway for the attorneys' fees incurred in defending itself against patently frivolous, unreasonable and vexatious proceedings. But for the district court's findings that the three attorneys were responsible for the abuses, Roadway's costs, including

counsel fees, could have been assessed against the individual plaintiffs. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).[4] Far from "absurd" or "unreasonable," the district court's decision reached the eminently sensible result of holding the perpetrators rather than the victims of the misconduct accountable for the economic consequences of the vexatious conduct. The court of appeals' holding, on the other hand, restricts attorneys' fees assessments to innocent litigants which, under the facts of this case, would indeed have been an absurd and unreasonable result.

Nor did the district court's decision produce a result " 'plainly at variance with the policy of the legislation as a whole.' " *United States v. American Trucking Ass'ns., supra*, 310 U.S. at 543. Congress intended for attorneys' fees to be allowed "as part of the costs" to employers forced to defend themselves against frivolous, unreasonable and vexatious actions filed under Title VII and 42 U.S.C. § 1981. *Christiansburg Garment Co. v. EEOC, supra*, 434 U.S. at 420-21.[5] Yet, at the same time, Congress also intended for such fees to be allowed only in exceptional

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[4] Indeed, the district court might have correctly assessed the fees against the individual plaintiffs in spite of its findings concerning the attorneys' responsibility for the misconduct. Prate v. Freedman, 583 F.2d 42, 48 (2d Cir. 1978).

[5] Restitution and deterrence, however, are not the only principles supporting attorneys' fees awards to employers.

> Discouraging frivolous or vexatious litigation . . . is wholly consistent with congressional purpose, both because no valid purpose would be furthered by such litigation, and by discouraging it the courts would be free to focus their attention on substantial cases which present substantial issues arising under the civil rights laws.

Brief of the NAACP Legal Defense Fund, Inc., as *Amicus Curiae* at 15 (footnote omitted), Christiansburg Garment Co. v. EEOC, *supra*.

cases, in order to diminish the chilling effects of potential fee liability on the willingness of persons of limited means to vindicate their rights. *Id.* at 422.[6] Such an intent is totally at odds with holding plaintiffs of limited means responsible for substantial sums of money properly awarded to a defendant because of plaintiffs' counsel's misconduct.[7] It is submitted, however, that utilizing

[6] The specter of incurring attorneys' fees liability because of *counsel's* misconduct has perhaps even a greater "chilling" effect than simply knowing that such liability may be imposed because of one's own misconduct. *See* Note, *Attorneys' Fees and the Federal Bad Faith Exception*, 29 Hastings L.J. 319, 341-42 n.153 (1977) (noting such effects and arguing that the ABA Code of Professional Responsibility is "not a sufficient safeguard to deter bad faith litigation").

[7] *Compare* Flora v. Moore, 461 F. Supp. 1104, 1122 (N.D. Miss. 1978) (defendant's attorneys' fees in vexatious employment discrimination suit assessed against Legal Services Corporation representing plaintiffs where plaintiffs were "personally unaware of the irresponsible and vexatious manner in which their counsel were pursuing their action.... Although § 706(k) might be read to make plaintiffs legally liable, it would, we think, be unjust to impose personal liability upon the plaintiffs on a theory of vicarious responsibility under such circumstances.") *with* Prate v. Freedman, *supra*, 583 F.2d at 48 (plaintiffs' attorneys' responsibility for frivolous Title VII action, if anything, merely mitigates the amount of fees awarded against the plaintiffs), *citing* Link v. Wabash R.R., 370 U.S. 626, 633-34 (1962) ("each party is deemed bound by the acts of his lawyer-agent").

The *Prate* result is objectionable on at least two equitable grounds. First, the individual plaintiff is saddled with a financial obligation which he or she is only constructively charged with incurring. The real culprit, the attorney, would, unless the district court's holding in this case is reinstated, probably escape all economic consequences. Alternatively, the plaintiff might hire yet another lawyer and proceed with some attempt at obtaining indemnification from the attorney, such as

(footnote continues)

alternatives to direct assessments against individual plaintiffs, such as assessments against culpable attorneys, is totally consistent with congressional intent.[8]

(footnote continued)

a malpractice action. *See generally* Comment, *Financial Penalties Imposed Directly Against Attorneys In Litigation Without Resort to the Contempt Power*, 26 U.C.L.A. L. Rev. 855, 867-68 (1979). This course often would be economically prohibitive to Title VII plaintiffs and is certainly inefficient if responsibility for the fees can be otherwise assessed in the proceeding relating to the original action. *See* Acevedo v. Immigration & Naturalization Serv., 538 F.2d 918, 921 (2d Cir. 1976) (noting the client's inability to pay costs of misconduct and "modest education" in assessing costs against attorney under §1927). Second, reducing the fee award ignores the other victim of the misconduct, the employer. If employers are prohibited from recovering "excess costs," including attorneys' fees, under § 1927, and are awarded "mitigated" fees against individual plaintiffs who, as in this case, are not responsible for the vexatious suit in the first place, the fee award will be of little aid to the employer in recouping its losses.

[8] The Senate debates on § 1988 in particular reflect that Congress certainly did not intend for such legislation to protect unscrupulous lawyers or encourage attorney misconduct, as shown by the following exchange between two of the bill's floor managers in the Senate.

> Mr. Abourezk. There has been a great deal made here on the floor by opponents of this legislation that it would encourage frivolous lawsuits. It has been the "lawyers' relief bill," as every bill has been called when it has come up and there has been opposition to it. But, according to the provisions of the bill itself, is it not true that the legislation says the court, in its discretion, may award attorneys' fees to the prevailing party, so that if the defendant in a civil rights suit were to prevail the court could prevent a frivolous lawsuit by having that provision available?
>
> Mr. Hathaway. The Senator is absolutely correct. There is adequate safeguard in the bill to protect against frivolous lawsuits.

(footnote continues)

The result reached by the district court is also consistent with Congress' intent in section 1927. Passed in 1813 as part of "An Act concerning suits and costs in courts of the United States," Act of July 22, 1813, 3 Stat. 21,[9] section 1927 was apparently designed to remedy abuses by United States Attorneys, at that time compensated by statute on a per-service basis, who multiplied proceedings in order to increase their fees.[10] Thus, from the very beginning, attorneys' fees were within the purview of section 1927.

(footnote continued)

> Mr. Abourezk. So if somebody thought, some lawyer thought, he was going to make a lot of money by bringing civil rights suits he would be subject to being penalized himself; is that not correct?
>
> Mr. Hathaway. The Senator is correct.

122 Cong. Rec. 31832 (1976). *See also id.* at 35124 (remarks of Rep. Drinan) ("This bill is not intended, nor are the other 52 similar provisions in Federal law, to encourage groundless and frivolous litigation or to allow lawyers or litigants or their clients to recover unjustly from a defendant."). There is no indication that Congress intended to foreclose other available procedures under Federal law which might arise out of enforcement or assessment of an attorneys' fees award. *Cf. id.* at 35117 ("the defendant can take every legal remedy available to him to reach the essence of the plaintiff").

[9] The full text of the original provision is reproduced in Appendix A, *infra*. Also included in Appendix A are the texts of the provision from enactment to its current codification.

[10] Materials on the legislative history of § 1927 are limited. On June 18, 1813, the Senate appointed a committee

> to inquire what legislative provision is necessary to prevent multiplicity of suits or processes, where a single suit or process might suffice for the administration of justice in any cause to which the United States may be a party, or before any court of the United States, and that the committee have leave to report by bill or otherwise.

(footnote continues)

The statute existed in relative obscurity[11] until the general recodification of the Judicial Code in 1948, when

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(footnote continued)

47 Annals of Cong. 29 (1813). A bill was reported by the committee on July 7, 1813, *id.* at 43, read a second time the next day, *id.* at 45, and ordered to a third reading as amended on July 15, 1813. *Id.* at 54. The bill was read a third time and passed in the Senate on July 16. *Id.* at 57. The bill was submitted to the House on July 16, *id.* at 446, read twice and referred for further consideration by designated members of the House on July 17. *Id.* at 456. The bill was reported with amendments and passed the House on July 20, *id.* at 469, and the amendments were concurred in by the Senate on the same day. *Id.* at 60-61. Counsel for Roadway has been unable to locate any documents (committee reports, debates, Senate and House documents, or any other legislative publications) strictly contemporaneous with the enactment.

A letter from the Secretary of the Treasury to the Speaker of the House in 1842, however, clearly suggests the purpose outlined in the text. H.R. Doc. No. 25, 27th Cong., 3d Sess. (1842). Other congressional materials also support this interpretation, as the abuses apparently continued well into the century. *See, e.g.*, Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 253, 250-54 & nn. 23-26 (1975) (citing and quoting congressional materials concerning the 1842 and 1853 fee bills). For a summary of the abuses, see Cong. Globe, 32d Cong., 2d Sess. App. 207-09 (1853) (remarks of Sen. Bradbury). The Secretary of the Treasury's comments on § 1927 provide an interesting view of the statute, a view not unlike that of a modern observer. *Compare* H.R. Doc. No. 25, 27th Cong., 3d Sess. 21 (1842) ("The statute... to restrain the increase of costs unreasonably and vexatiously, has been disregarded in practice; or it is defective in its provisions, if insufficient to prevent the abuses and mischiefs which have occurred, and which it ought to prevent, if it [does] not.") *with* Comment, *Sanctions Imposed by Courts On Attorneys Who Abuse the Judicial Process, 44 U. Chi. L. Rev.* 619, 623-29, 640 (1977) (noting the statute's disuse and arguing for its frequent application).

[11] Shortly after its enactment, this Court was presented with a case involving § 1927. Field v. United States, 34 U.S. (9 Pet.) 182 (1834). Chief Justice Marshall, however, found it

(footnote continues)

the most succinct statement of congressional intent, apart from the language of the statute itself, occurred. In 1948 Congress made minor changes in the phraseology of section 1927 and, more importantly, inserted the word "personally" under the authority of *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir. 1912). H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947). *Steiner* sets forth generally the operative language of the statute, 201 F. at 64, and describes with great precision both the "evident purpose" of the statute and the expenses includable in an assessment of "costs" under section 1927.

> The evident purpose of this section is to punish the lawyer who vexatiously increases costs, by making him, and not his client, liable for the increase occasioned by his improper conduct. It recognizes that such costs should not have been incurred and places their payment on the person who is responsible for them.

Id.

> If, on the other hand, the defendant's expenses are not *taxable as costs*, it is obvious that the

(footnote continued)

unnecessary to reach the issue: "With the question of costs this court has nothing to do; and as the judgment is reversed for another cause, it becomes immaterial to be considered." *Id.* at 202.

The language of § 1927 was included with minor changes in phraseology, see Appendix A, *infra*, in the 1853 fee bill. Act of Feb. 26, 1853, 10 Stat. 162. The House Report on the fee bill, H.R. Rep. No. 50, 32d Cong., 1st Sess. (1852), however, contains no direct reference to the provision. The provision thereafter became § 982 of the Revised Statutes, again with minor changes. See Appendix A, *infra*. The statute apparently was not changed in the 1911 amendments to the Judicial Code.

> complainant's conduct did not increase costs to the extent of these expenses.

Id. at 65 (emphasis added). The policies stated by the *Steiner* court, of course, parallel those articulated by the district court in the instant case. Similarly, the "costs" assessed in this case were specifically limited to "only such costs as normally would be allowed to the prevailing party" (Pet. App. D, at p. 23a); that is, taxable costs. Again, the exception to the plain meaning rule does not surface.

There remains, of course, the argument advanced in *United States v. Ross*, 535 F.2d 346, 350-51 (6th Cir. 1976), and expanded upon by the court of appeals below, "that the 'costs' provided by § 1927 should be limited to taxable costs [and] that attorneys' fees cannot be part of those costs" (Pet. App. A, at p. 6a). Since the general American rule excludes attorneys' fees from taxable costs, *e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975), the argument is generally valid. Attorneys' fees ordinarily may not be assessed against attorneys under section 1927 because, in the absence of one of the exceptions to the American rule, counsel fees are not "taxable costs" which can be assessed against the client. *Motion Picture Patents Co. v. Steiner*, *supra*, 201 F. at 64-65. This general rule, however, is inapplicable to the instant case. In this case, attorneys' fees are taxable costs[12] which can be assessed against the client under

[12] This Court has specifically held that attorneys' fees awarded pursuant to § 1988 are "taxable costs," Hutto v. Finney, 437 U.S. 678, 696-97 (1978), noting in the process that statutes such as § 706(k) and § 1988 are among those statutes which "define attorneys' fees as an element of costs, while others separate fees from other taxable costs." *Id.* at 697 n.28, *citing* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, *supra*, 421 U.S. at 260-61 n.33. *See also* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976) (attorneys' fees awards against state and local officials pursuant to § 1988 should be treated "like other items of costs").

statutory exceptions to the American rule, namely sections 706(k) and 1988.[13]

Finally, the court of appeals' reliance on the "penal nature" of section 1927 and on this Court's opinion in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714 (1967), is misplaced. First, the fact that section 1927 may be arguably penal in nature[14] does not warrant a construction of the statute which ignores its plain meaning. *E.g., Huddleston v. United States*, 415 U.S. 814, 831

[13] Congress is presently considering an amendment to § 1927 which would specifically include attorneys' fees as "costs" available under the statute in all cases. Senate Bill 390, which includes the amendment, was passed on July 20, 1979, and, since July 26, 1979, when the bill was referred to a House subcommittee, no further action on the legislation apparently has been taken. *See generally* 125 Cong. Rec. S1343 to S1368 (daily ed. Feb. 8, 1979); *Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly*, 96th Cong., 1st Sess. (1979). The current version of § 1927 has been described in this process as limited to "taxable costs." *E.g.*, Senate Antitrust Hearings, *supra*, at 27 (statement of Hon. Charles B. Renfrew).

[14] Viewed from the client's position, § 1927 is far from "penal," since it protects the client from the results of the attorneys' misconduct. Toledo Metal Wheel Co. v. Foyer Bros. & Co., 223 F. 350, 358 (6th Cir. 1915). *Cf.* Huntington v. Attrill, 146 U.S. 657, 676-77 (1892) (statute rendering corporate officers liable for debts arising from falsification of stock certificate penal as to officers but "clearly remedial" as to defrauded creditors). Accordingly, § 1927 should be construed liberally, particularly in cases where the result of a liberal construction would further enforcement of the civil rights acts by protecting plaintiffs while at the same time allowing the defendant to recover its attorneys' fees. *See also* 3 Sutherland Statutory Construction, *supra*, § 70.01 ("One of the historic functions of the law is to protect individuals from harms inflicted by fraud, deception and exploitation of unfair advantage.... Legislation of this character generally is construed in the way that maximizes its remedial effects as much as the legislative text reasonably permits.").

(1974). Furthermore, the authority for the basic award of attorneys' fees in this case is not section 1927. Section 1927 simply provides for a shifting of responsibility for the payment of costs authorized by other statutes applicable to the case or other authority available to the court. Consequently, whatever the result of a strict construction of section 1927 may be, that result can have absolutely no impact on the question of whether a particular item is a "taxable cost" and thus whether it may be assessed against an attorney under section 1927. That question is answered exclusively and independently by other statutes, such as sections 706(k) and 1988. The construction accorded these statutes, of course, can hardly be classified as "strict," even when applied to defendants, *see Christiansburg Garment Co. v. EEOC, supra*, 434 U.S. at 423 n.20 ("In short, there are equitable considerations on both sides of this question."), and the nature of attorneys' fees statutes such as sections 706(k) and 1988 is far from "penal." *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (per curiam) (attorneys' fees provisions of civil rights acts not intended as penalties but as aids to advancement of public interest served by such legislation).[15]

[15] Attorneys' fees awards to defendants are as much a part of effective enforcement of the civil rights acts as awards to plaintiffs.

> [W]hile it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority," *Piggie Park, supra*, 390 U.S., at 402, it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary process, *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355. A fair adversary process presupposes both a vigorous prosecution and a vigorous defense. It cannot be lightly assumed that in enacting § 706(k), Congress intended to distort that process by giving the private plaintiff substantial

(footnote continues)

Second, the court of appeals' reliance on *Fleischmann Distilling Corp. v. Maier Brewing Co.*, *supra*, is misplaced. That case involved the question of whether attorneys' fees were properly awarded to a plaintiff as "costs of the action" pursuant to section 35 of the Lanham Act. 15 U.S.C. § 1117 (amended 1975). Recognizing the general American rule that "attorneys' fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing, therefor," 386 U.S. at 717, this Court, finding no exception present, *id.* at 720, declined to award attorneys' fees "without either statutory language or legislative history to support the unusual construction." *Id.* In the instant case, of course, attorneys' fees are specifically provided for by sections 706(k) and 1988, thereby creating an express exception to the American rule adhered to in *Fleischmann Distilling Corp.* Again, section 1927 simply provides the court with a vehicle to fix the responsibility for costs properly allowed under other statutes and other authority available to the court.[16]

(footnote continued)

> incentives to sue, while foreclosing to the defendant the possibility of recovering his expenses in resisting even a groundless action unless he can show that it was brought in bad faith.

Christiansburg Garment Co. v. EEOC, *supra*, 434 U.S. at 419. *See also* Prate v. Freedman, *supra*, 583 F.2d at 48 ("The consequences of [plaintiffs'] attorneys' mistakes should not be visited upon the [defendant], whose participation in these suits helped to further the salutary purposes of Title VII.").

[16] The court of appeals' characterization of the district court's holding as a "hybrid result" (Pet. App. A, at p. 8a), ignores the fact that § 706(k), § 1988 and § 1927 all concern the same subject: "costs." The three statutes should, therefore, be construed *in pari materia*. *See generally* 2A Sutherland Statutory Construction, *supra*, §§ 51.01-.04. *See also* St. Louis, Iron Mt. & S. Ry. v. United States, 251 U.S. 198, 207 (1920) ("But, Congress must be presumed to have known of its former legislation . . ., and to have passed the new laws in view of the provisions of the legislation already enacted. These statutes must be construed together and effect given to all of them.").

II.

ASSUMING THAT SECTIONS 706(k) AND 1988 ARE INAPPLICABLE TO SECTION 1927, COURTS POSSESS INHERENT POWER TO INCLUDE ATTORNEYS' FEES AS COSTS UNDER SECTION 1927

Courts possess inherent power "to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962). Since courts also possess inherent equitable power to assess "costs of litigation other than conventional taxable costs," *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 166 (1939), the district court's award of attorneys' fees to Roadway was supported by the "bad faith" exception to the American rule. *E.g.*, *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Vaughan v. Atkinson*, 369 U.S. 527 (1962). See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, *supra*, 421 U.S. 240, 258-59 (1975).[17] Again, once awarded, the responsibility for payment was properly shifted from the individual plaintiffs to the three attorneys pursuant to section 1927. *Motion Picture Patents Co. v. Steiner*, 201 F. 63 (2d Cir. 1912); *see Browning Debentures Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1088-89 (2d Cir. 1977) ("Bad faith is personal. . . .") (citation omitted).

The assessment against the three attorneys also falls well within the district court's inherent power to impose sanctions on the members of its bar.

> The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district

[17] Thus, the court of appeals' reliance on Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714 (1967), is again misplaced.

> court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secures certain privileges and also assumes definite obligations.
>
> The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record.

Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 735 (3d Cir.) (en banc) (Biggs, C.J., dissenting), *cert. denied*, 371 U.S. 888 (1962); *accord*, *In re Sutter*, 543 F.2d 1030, 1036-38 (2d Cir. 1976); *Flaska v. Little River Marine Constr. Co.*, 389 F.2d 885, 888 (5th Cir.), *cert. denied*, 392 U.S. 928 (1968).[18] The plain language of section 1927 recognizes this authority. An assessment of sanctions is generally committed to the sound discretion of the district court, *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43 (1976) (per curiam), and it is submitted that when sanctions are imposed on attorneys, officers of the court, the district court's discretion must be accorded even greater deference.

[18] In light of the Fifth Circuit's statement in *Flaska* that "[t]he inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions on errant lawyers practicing before it," 389 F.2d at 888, the court's opinion in the instant case is puzzling. Although Roadway argued cases such as *Flaska* as an alternative ground for affirmance of the district court's assessment, the court of appeals did not discuss the issue in its opinion in this case.

CONCLUSION

The judgment of the court of appeals, insofar as it vacated that portion of the district court's judgment which included attorneys' fees in the section 1927 assessment, should be reversed.

Respectfully submitted,

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Appendices

APPENDIX A

An Act concerning suits and costs in courts of the United States.

. . . .

Sec. 3. *And be it further enacted*, That whenever causes of like nature, or relative to the same question shall be pending before a court of the United States or of the territories thereof, it shall be lawful for the court to make such orders and rules concerning proceedings therein as may be conformable to the principles and usages belonging to courts for avoiding unnecessary costs or delay in the administration of justice, and accordingly causes may be consolidated as to the court shall appear reasonable. And if any attorney, proctor, or other person admitted to manage and conduct causes in a court of the United States or of the territories thereof, shall appear to have multiplied the proceedings in any cause before the court so as to increase costs unreasonably and vexatiously, such person may be required by order of court to satisfy any excess of costs so incurred.

Act of July 22, 1813, 3 Stat. 21.

Whenever two or more indictments, suits or proceedings, are or shall be prosecuted, which should be joined, the district attorney prosecuting them shall be paid but one bill of costs for all of them; and if any attorney, proctor, or other person admitted to manage or conduct causes in any court of the United States, or of the Territories thereof, shall appear to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, such person may be required, by order of the court, to satisfy any excess of costs so increased.

Act of Feb. 26, 1853, 10 Stat. 162.

If any attorney, proctor, or other person admitted to conduct causes in any court of the United States, or any Territory, appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased.

Revised Stats. § 982.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

28 U.S.C. § 1927.

Supreme Court, U.S.
FILED
MAR 25 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC., *Petitioner,*

v.

J.D. MONK, PERCY GREEN, ROBERT McPHERSON

AND

ROBERT E. PIPER, JR., FRANK E. BROWN, JR., BOBBY STROMILE, *Respondents.*

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, pp 1A-18) is reported at 599 F.2d 1378. The opinion of the District Court on rehearing (Pet. App. C, pp 11A-13A) is not reported. The opinion of the District Court (Pet. App. D, pp 14A-28A) is reported at 73 F.R.D. 411 (1977).

JURISDICTION

The judgment of the Court of Appeals was entered on August 3, 1979. The petition for writ of certiorari

was filed on October 31, 1979 and the writ was granted on January 7, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. §2000e-5(k) provides:

> (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §1988 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

QUESTION PRESENTED

Whether the provisions of the Civil Rights Act of 1964 §706(k) now 42 U.S.C. §2000e-5(k) and 42 U.S.C. §1988 can be merged with 28 U.S.C. §1927 so as to permit the assessment of attorney's fees against an attorney personally? If so, is it appropriate in this case?

STATEMENT OF THE CASE

J.D. Monk, Percy Green and Robert McPherson, individually and on behalf of other similarly situated blacks, filed suit on June 3, 1975 against Roadway Express, Inc. and the International Brotherhood of Teamsters and its Local No. 194 alleging employment discrimination. (R.1). The plaintiffs were represented by three black attorneys, Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile, respondents herein. This suit was filed after the receipt of right to sue letters by Monk, Green, and McPherson. (*See,* Exhibit Piper & Brown #1, #2, and #3 introduced at hearing on October 5, 1976). Monk and McPherson received findings of probable cause of discrimination in hiring by the EEOC. (*See,* Exhibit Piper & Brown #1 and #3).

On September 2, 1975, discovery was commenced by plaintiffs propounding interrogatories to Roadway. (R.37). On January 5, 1976, Roadway answered these interrogatories and on the same date, propounded interrogatories to the plaintiffs. (R.113).

On April 13, 1976, Roadway filed a motion requesting an order to be issued by the Court compelling plaintiffs to answer these interrogatories. (R.253). Magistrate James Barton on April 22, 1976, ordered that the interrogatories propounded by Roadway to the plaintiffs be answered on or before May 24, 1976 and denied a request by Roadway for an assessment of attorney's fees and expenses. (R.259).

Contemporaneous to Magistrate Barton's decision, Roadway noticed the depositions of the named plaintiffs to be taken on May 6 and May 7, 1976. The depositions of Monk and Green were taken. Attorneys for plaintiffs could not locate Mr. McPherson; he was not served with a subpoena compelling his attendance at the deposition; and his deposition was not taken. (R. 350). On June 14, 1976, Roadway filed a motion to dismiss the complaint of J.D. Monk, et al, for failure to answer interrogatories. This motion was filed pursuant to Rule 37(d) of the Federal Rules of Civil Procedure and requested reasonable expenses, costs of court, and attorney's fees in connection with defendant's failure to make discovery. (R.343). On June 30, 1976, the District Court dismissed the case without prejudice, retaining jurisdiction as far as sanctions were concerned. (R.558).

An evidentiary hearing was held on October 5, 1976 (R.698) and on January 6, 1977, the Honorable Ben C. Dawkins, Jr., Senior United States District Judge, rendered a decision awarding attorney's fees and costs against Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile. (R.740). A motion for a rehearing was filed (R.755) and on April 13, 1977, said motion for rehearing was denied. (R.787).

On May 5, 1977, a judgment was rendered in favor of Roadway Express and against Robert E. Piper, Jr., Frank E. Brown, Jr. and Bobby Stromile awarding attorney's fees and costs against them in the amount of $17,372.53. (R. 790). On May 25, 1977, an amended judgment was filed in which the claim of Roadway for the assessment of attorney's fees against Monk, Green,

and McPherson was dismissed, with prejudice. (Pet. App. B, at pp. 9a-10a). Respondents appealed the award of attorney's fees to the United States Court of Appeals, Fifth Circuit. Roadway did not appeal the denial of an assessment of attorney's fees against Monk, Green, and McPherson.

The United States Courts of Appeals for the Fifth Circuit found that the District Court's determination concerning the vexatiousness of the respondents' behavior was not clearly erroneous but did determine that attorney's fees could not be considered part of the "excess costs" under 28 U.S.C. §1927. Accordingly, the Court of Appeals vacated the judgment of the District Court and remanded the case for further proceedings consistent with its opinion. (Pet. App. A, p. 1a-8a).

The Fifth Circuit concluded that attorney's fees were not contemplated as "costs" under §1927. It was observed that §1927 was penal in nature and therefore subject to the rule of strict construction. The Court relied on the following language from *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720 (1967) in reaching its decision:

> "When a cause of action has been created by a statute which expressly provides the remedies for vindication of the cause, other remedies should not readily be implied." *Id.* at 720.

The Court also noted, relying on *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978), that 42 U.S.C. §§1988 and 2000e-5(k) permitted the assessment of attorney's fees against unsuccessful parties but not against attorneys of those parties. Furthermore, the Court concluded that the District Court could not "combine the provisions of those statutes (§§1988 and 2000e-5(k)) with those of §1927 to produce a hybrid result contemplated by none of the statutes." (Pet. App. A., p. 8a).

SUMMARY OF THE ARGUMENT

I

42 U.S.C. §§2000e-5(k) and 1988 should not be merged with 28 U.S.C. §1927 to reach a result not contemplated by any of the statutes. 42 U.S.C. §§2000e-5(k) and 1988 allow the recovery of attorney's fees to the "prevailing party" but do not provide authority for assessing the fees against the opposing attorney. 28 U.S.C. §1927 allows the Court to assess "excess costs" against an attorney who engages in vexatious conduct. The statute does not provide for the inclusion of attorney's fees. As was noted by the Fifth Circuit, the provisions of these statutes should not be combined to "produce a hybrid result contemplated by none of the statutes." (Pet. App. A, p. 8a). Further evidence of the fact that §1927 does not include attorney's fees is the Bill passed by the Senate, S.390, 96th Congress, First Session, which seeks to amend 28 U.S.C. §1927 to allow the recovery of attorney's fees.

An award of attorney's fees under 42 U.S.C. §2000e-5(k) against the plaintiff in a Title VII case is governed by the decision in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978). Under *Christiansburg* the Court must determine that the plaintiff's claim was "frivolous, unreasonable, or groundless" before liability for attorney's fees can be imposed. In this case there was no such finding and the only findings were with regard to the conduct of the plaintiff's attorneys. Accordingly there is no basis, even under plaintiff's theory, to enlarge the definition of "costs" under §1927.

II

28 U.S.C. §1927 establishes statutory penalties that may be used by the court to punish lawyers. Because the statute is penal in nature, it is subject to the rule of strict construction and unless the language of 28 U.S.C. §1927 "plainly and unmistakably" allows an award of attorney's fees as part of the "costs" the construction of the statute must be construed in favor of the respondents in this matter. *United States* v. *Bass,* 404 U.S. 336 (1971).

III

The judiciary does not have a free hand in allowing attorney's fees as costs. *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240 (1975). 28 U.S.C. §1927 does not state that attorney's fees can be awarded as part of the costs. The cases interpreting the statute have held likewise.

ARGUMENT

I. 42 U.S.C. §§2000e-5(k) And 1988 Should Not Be Merged With 28 U.S.C. §1927 To Reach A Result Not Contemplated By Any Of The Statutes.

A. Neither 42 U.S.C. §§2000e-5(k) and 1988 nor 28 U.S.C. §1927 allow recovery of attorney's fees against the attorney.

Petitioner argues that 42 U.S.C. §§2000e-5(k) and 1988 should be combined with 28 U.S.C. §1927 to reinstate the District Court's award of attorney's fees as a part of the "costs" against the attorneys who

represented J.D. Monk, Percy Green, and Robert McPherson.[1]

Petitioner urges this Court to read these statutes and interpret them in accordance with their "plain meaning".[2] The plain meaning of none of the statutes reaches the result suggested by petitioner. 42 U.S.C. §§2000e-5(k) and 1988 allow the Court, in its discretion, to award "the prevailing party" a "reasonable attorney's fee." These statutes clearly do not allow the award of attorney's fees against the opposing attorney, nor was it the intent of Congress to reach this result.

42 U.S.C. §2000e-5(k) was originally enacted as §706(k) of Title VII of the Civil Rights Act of 1964. The legislative history indicates that a primary intent of the attorney's fees provision was to "make it easier for a

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[1] 28 U.S.C. §1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

42 U.S.C. §2000e-5(k) provides:

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee a part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. §1988 provides, in pertinent part:

In any action or proceeding to enforce a provision of §§1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2] Brief for Petitioner, p.7.

plaintiff of limited means to bring a meritorious suit."[3] In *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968), this Honorable Court recognized this congressional intent in dealing with the attorney's fees provision under Title II of the Civil Rights Act of 1964 which is virtually identical to §706(k) of Title VII. In *Piggie Park* it was noted that the plaintiff was acting as a "private attorney general" and was "vindicating a policy that Congress considered of the highest priority." If attorney's fees were not awarded it was concluded that the public interest would not be properly advanced. *Id.* at 401-402. The reasoning of *Piggie Park* was made applicable to cases pending under Title VII in *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975).

This Court in *Christiansburg Garment Co.* v. *EEOC,* 434 U.S. 412 (1978) also recognized the intent of Congress to "protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 418-419. Petitioner has urged that assessing attorney's fees under 42 U.S.C. §§2000e-5(k) and 1988 is "consistent with congressional intent" and refers specifically to the Senate debates on §1988 as supporting this contention.[4] The Senate Report accompanying the Bill which became §1988 as amended, the Civil Rights Attorney's Fees Awards Act, makes it clear that the award is to be made against the party, not against the party's attorney. Senate Report 94-1011, 94th Congress, Second Session stated that "this bill thus deters frivolous suits by authorizing an award of attorney's fees against a *party* shown to have litigated in 'bad faith'," (at p. 5) (emphasis added).

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[3] Remarks of Senator Humphrey, 110 Cong. Rec. 12724 (1964).

[4] Brief for Petitioner, p.10-11, fn

Moreover, the Supreme Court's discussion in *Christiansburg Garment Co.* v. *EEOC,* supra, of allowing of the award of attorney's fees to a prevailing party is based on the award being assessed against the party. See, e.g., 434 U.S. at p. 422. Nowhere in the decision does this Court suggest that attorney's fees might be assessed against attorneys. It is respectfully submitted that neither a reading of 42 U.S.C. §§2000e-5(k) and 1988, nor a review of the legislative history, nor a review of the case law interpreting the statutes authorizes a Court to tax attorney's fees against attorneys representing their clients.

Despite the admittedly scant legislative history of 28 U.S.C. §1927, petitioner suggests that "from the very beginning, attorney's fees were within the perview of §1927."[5] This suggestion is misleading and irrelevant because until 1853 attorney's fees were generally charged to the losing parties along with other costs. *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 251 (1975). The general statutory rule establishing what items are taxable as cost was changed with the enactment of Act of February 26, 1853, 10 Stat. 161 and the amendments thereto which are now embodied in 28 U.S.C. §1920. It does not include attorney's fees.[6]

Petitioner also places reliance on the decision in *Motion Picture Patents Company* v. *Steiner,* 201 F.63 (2nd Cir., 1912). This early decision makes it clear that

[5] Brief for Petitioner, p.12.

[6] This history is discussed in detail in *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 247-256. See also *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720; *Lockett* v. *Hellenic Sea Transports Ltd.,* 60 F.R.D. 469 (E.D. Pa. 1973); *Twentieth Century Fox Film Corp.* v. *Goldwyn,* 328 F.2d 190 (9th Cir. 1964) for the definition of "costs".

the Court has little discretion with regard to what may be allowed as costs and what those costs include. First, it was noted that the Court could not require the offending attorney to pay "all the costs, but only the excess of costs, which excess was occasioned by his unreasonable and vexatious conduct." *Id.* at p. 64. In an obvious reference to the narrow definition of costs under Rev. Stat. §823 and 824[7] the Court noted:

> "Unquestionably the laws of New York are much more liberal in the matter of costs and allowances than those of the United States, where the costs are hardly more than nominal."

In addition to the history of the statute and prior interpretations, this Honorable Court should consider the chapter and title in which §1927 is located as further evidence that attorney's fees are not contemplated in an award of costs against attorneys pursuant to this statute. This statute is located in Chapter 123—"Fees and Costs", and in that chapter costs are defined under §1920.[8] Had Congress intended to include a broader

[7] Discussed in *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240, 254-255 at footnotes 25, 26, 27, 28, and 29.

[8] 28 U.S.C. §1920, Taxation of Costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under §1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under §1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

definition of "costs" in §1927 than was contained in Chapter 123, it could have easily so indicated.

Further evidence of Congress' lack of intent to include attorney's fees within the provisions of §1927 is evidenced by a bill currently pending before Congress, S. 390 96th Congress, First Session.[9] The act, entitled "Anti-Trust Procedural Improvements Act of 1979", amends 28 U.S.C. §1927 to read as follows:

> "(a) Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who intentionally engages in conduct unreasonably and primarily for the purpose of delaying or increasing the cost of the litigation may be required by the court to satisfy personally the excess costs, expenses and *attorney's fees* reasonably incurred because of such conduct.
>
> "(b) Costs, expenses, and attorney's fees shall be imposed under this section upon motion of any party only after a hearing, held after trial.
>
> "(c) No such costs, expenses, and attorney's fees shall be imposed unless the attorney continues to engage in conduct which is deemed to violate this section after having been previously warned by the court that continuation of such conduct would result in the imposition of such costs, expenses and attorney's fees."[10] (emphasis added).

[9] This bill was passed by the Senate and referred to the Committee on the Judiciary, in the House of Representatives, July 24, 1979. The House bill amending 28 U.S.C. §1927 is H.R. 4047, 96th Congress, First Session. The subcommittee hearings on both the Senate and House bills indicate that attorney's fees are not included in 28 U.S.C. §1927, as it is presently written. U.S. Congress. Senate. Committee on the Judiciary; hearings before Subcommittee on Antitrust and Monopoly on "Antitrust Procedural Improvements Act of 1979". S. 390, February 20 and 26, 1979; Washington U.S. Government Printing Office 1979. U.S. Congress. House. Committee on the Judiciary; hearings before Subcommittee on Monopolies and Commercial Law on "Antitrust Procedural Improvements and Jurisdiction Amendments". H.R. 3271; 4046; 4047; 4048; 4049; 4050; May 31, September 27, and November 8, 1979. Washington: U.S. Government Printing Office 1979.

Had the meaning of this statute been so plain as contended by the petitioner and had the intent of Congress been so clear to include attorney's fees under §1927, then obviously there would have been no need for the Senate to pass a bill amending §1927.[11] Furthermore, if Congress had intended the merging of statutes which allow the granting of attorney's fees, such as 42 U.S.C. §2000e-5(k) and §1988 with §1927, there would have been no need for the proposed amendments to §1927 by the Anti-Trust Procedure Improvement Act. This is because 15 U.S.C. §15 provides that "any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefor . . . and shall recovery threefold the damages by him sustained, *and the cost of suit, including a reasonable attorney's fee.*" (emphasis added). Thus, according to petitioner's argument, 15 U.S.C. §15 could be merged with §1927 to obtain the desired result. Considering the foregoing, it is respectfully submitted

[10] See generally, Report to the President and the Attorney General of the National Commission for the Review of Anti-Trust Laws and Procedures, 80 F.R.D. 509 (1979).

[11] The Report of the Committee of the Judiciary of the United States Senate 96-238, 96th Congress, 2nd Sess., accompanying the Bill, Anti-Trust Procedure Improvements Act of 1979 stated:

> "Second, Section 4 broadens the range of increases expenses which an attorney who engages in dilatory litigation practices may be required by the judge to satisfy personally. Section 1927 currently refers to 'excess costs.' This language has been construed to be limited to the narrow category of taxable costs, such as filing fees. Section 4 expands this language to allow the judge to order an attorney to satisfy personally 'excess costs, expenses, and attorney's fees reasonably incurred because of such (dilatory) conduct.' "

that Congress certainly did not state, nor was it the intent of Congress to allow an award of attorney's fees against an attorney pursuant to 42 U.S.C. §§2000e-5(k) and 1988 nor was it intended that "excess costs" under 28 U.S.C. §1927 include attorney's fees.

B. §2000e-5(k) and §1988 deal with the merits of plaintiff's claim; §1927 deals with the conduct of the lawyer.

Under the theory advanced by petitioner in its brief, an award of attorney's fees assessed against the lawyer in this case is predicated on an initial finding of liability under §§2000e-5(k) and 1988 and the merging of this finding with §1927 to allow an award against the attorney. This Court has held in *Christiansburg Garment Co.* v. *EEOC,* supra, that attorney's fees can only be awarded under §2000e-5(k) to the "prevailing party"[12] and that attorney's fees should not be assessed against the plaintiff "unless a Court finds that his claim was frivolous, unreasonable, or groundless, or that plaintiff continued to litigate after it clearly became so." 434 U.S. at p. 422. There was no finding by the District Court that the claims of the plaintiffs were "frivolous, unreasonable, or groundless." The only finding made by the District Court was with regard to the conduct of the attorneys. (Pet. App. p. 14a-28a). The District Court never made any determination of the plaintiff's claims on the merits and dismissed the case without prejudice. (R.558).

Contrary to the requirement of *Christiansburg* that the plaintiff's claim be frivolous, unreasonable, or

[12] It is interesting to note that under petitioner's theory of statutory construction, no attorney's fees could be assessed under §1927 against an attorney representing the prevailing party.

groundless, the determination letters of the EEOC with regard to the claims of Monk and McPherson, (*See,* Exhibit Piper & Brown #1 and #3 introduced at hearing on October 5, 1976) indicate a finding of probable cause of discrimination in hiring practices.[13] It is evident that the record in this matter does not provide a sufficient basis for the establishment of an award of attorney's fees against the plaintiffs under the *Christiansburg* rule.[14] Accordingly, if there is no basis for an award of attorney's fees under 42 U.S.C. §§2000e-5(k) and 1988, then there is no basis for enlarging the definition of "costs" under §1927 which deals with the conduct of lawyers. In other words, even if one could merge the provisions of 42 U.S.C. §§2000e-5(k) and 1988 with 27 U.S.C. §1927, there is no basis in the record for a finding of liability against the plaintiffs, Monk, Green and McPherson.[15]

[13] The finding of reasonable cause by the EEOC is only made for a relatively small number of charges filed with the EEOC. A survey of 98,135 charge resolutions from July 1, 1972 through March, 1975 showed that there were 21,905 cause findings or only 22.3%. There were no cause findings for 16.3% of the charges, consolidation accounted for 1.8% of the charges, administrative closures for failure to proceed in 47.7%, administrative closure for no jurisdiction in 11.9%. *Report to the Congress by the Comptroller General of the United States,* "The Equal Employment Opportunity Commission Has Made Limited Progress in Eliminating Employment Discrimination", (Sept. 28, 1976) at p.12.

[14] A strong argument can be made that Roadway is not a "prevailing party." *Grubbs* v. *Butz,* 548 F.2d 973 (D.C. Cir. 1976).

[15] It should be noted that Roadway did not appeal the District Court's failure to assess attorney's fees against Monk, Green, and McPherson. (Pet. App. B, p.9a).

II. 28 U.S.C. §1927 Is Penal In Nature And Must Be Narrowly Construed.

28 U.S.C. §1927 establishes statutory penalties that may be used by the Court to punish lawyers who engage in vexatious conduct. Although this is not a criminal statute, it is required to be construed with the same strictness as other statutes of Congress which impose penalties. *Top Value Meats, Inc.* v. *F.T.C.*, 586 F.2d 1275, 1282 (1978); *Schwartz* v. *Romnes,* 495 F.2d 844 (2nd Cir., 1974). In outlining the requirement of strict construction when dealing with a penal statute, the Court noted in *Schwartz* that the need for strict construction is especially compelling when the application of a statute may result in the infringement of First Amendment Rights under the United States Constitution. *Id.* at 849. The right of a client to vigorous and effective representation is one protected by the First Amendment. *NAACP* v. *Button,* 371 U.S. 415 (1963); *Brotherhood of Railroad Trainmen* v. *Virginia,* 377 U.S. 1 (1974).

The strict construction of a statute which imposes penalties protects the person being penalized from unfair surprise, provides an adequate warning of the punishment and requires that ambiguities in the statute are to be resolved in favor of leniety. *United States* v. *Bass,* 404 U.S. 336, 347-348 (1971). Application of the requirement of strict construction to 28 U.S.C. §1927 requires adherence to the specific language of the statute. The statute provides that an attorney who "so multiplies the proceedings in any case as to *increase costs* unreasonably and vexatiously may be required by the Court to satisfy personally such *excess costs.*" The statute does not mention the assessment of attorney's fees against the attorney who acts unreasonably. It cannot be said that Congress has "plainly and unmistakably," as required by *U.S.* v. *Gradwell,* 243 U.S. 476, 485 (1917), provided authority for the Court to assess attorney's fees against an attorney under §1927. Therefore, because ambiguity exists, the doubt must be resolved in favor of the respondents in this matter.[16] This was the conclusion reached by the Fifth Circuit relying on *U.S.* v. *Ross,* 535 F.2d 346 (6th Cir., 1976) and *Fleischmann Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714 (1967).

III. "Costs" As Referred To In 28 U.S.C. §1927 Does Not Include Attorney's Fees.

Under the "American rule" as discussed in *Alyeska Pipeline Services* v. *Wilderness Society,* 421 U.S. 240, the prevailing party may not recover attorney's fees as costs or otherwise.[17] As noted in *Alyeska,* Congress has not extended "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted," *Id.* at p. 260. There have been other cases preceding and following *Alyeska* in which this court has refused to allow an award for attorney's fees unless expressly authorized by statute. *Fleischmann* v. *Mayer Brewing Co.,* 386 U.S. 714 (1967); *F.D. Rich Company* v. *Industrial Lumber Co.,* 417 U.S. 116 (1974); *Runyon* v. *McCrary,* 427 U.S. 160 (1976). In the above cases this court has made it

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[16] This Court has recently rejected an attempt in a criminal case to engraft one statute to another statute and thus produce a more severe penalty than originally allowed by the first statute alone. *Simpson* v. *U.S.,* 435 U.S. 6 (1978).

[17] The exceptions to this rule are: 1) applicable statutory authorization for attorney's fees; 2) an award for attorney's fees against a *party* who has acted in bad faith; and 3) the exception based on the "common benefit" theory. 421 U.S. 245.

clear that attorney's fees would not be awarded in a case unless there was clear statutory authority to allow such fees. Such statutory authority is not provided in the language of §1927.

The District Courts and Courts of Appeal which have fully considered whether attorney's fees should be awarded pursuant to §1927 have all concluded that §1927 does not permit the taxing of any additions, such as attorney's fees, over "regular costs". *1507 Corporation* v. *Henderson,* 447 F.2d 540 (7th Cir. 1971); *United States* v. *Ross,* 535 F.2d 346 (6th Cir. 1976); *Kiefel* v. *Las Vegas Hacienda, Inc.,* 404 F.2d 1163 (7th Cir. 1969); *Exhibitors Poster Exchange, Inc.* v. *National Screen Service Corp.,* 78 F.R.D. 192 (E.D.La. 1978); *Chrysler Corp.* v. *Lakeshore Commercial Finance Corp.,* 389 F.Supp. 1216 (E.D.Wis. 1975), aff'd 549 F.2d 804 (7th Cir. 1977).[18]

Petitioner cites a number of cases at the end of its brief which it says stand for the proposition that courts "possess inherent power to include attorney's fees as costs under §1927." None of the cases cited by petitioner at pages 19 and 20 of its brief allowed recovery for attorney's fee under §1927. The recognized "bad faith" exception to the "American rule" referred to by petitioner and noted in *Alyeska Pipeline Service* v. *Wilderness Society,* 421 U.S. 240, 258-259 allows an award of fees against the party but there is no reference

[18] Petitioner contended in its brief in support of its petition for a writ of certiorari that there was a split between the circuits as to whether attorney's fees could be awarded pursuant to 28 U.S.C. §1927. Petitioner has not made that argument in its most recent brief.

to the allowance of such award against an attorney.[19] It is submitted that petitioner has failed to present authority to support his contention that "cost" pursuant to §1927 includes attorney's fees.

CONCLUSION

The decision of the Court of Appeals vacating the judgment of the District Court and determining that attorney's fees could not be considered part of the "excess cost" under 28 U.S.C. §1927 was eminently correct and should be affirmed.

Respectfully submitted,

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[19] Attorney's fees may be authorized as part of the fine to be delivered on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 299, 426-428 (1923); See also recognition of this authority *F.D. Rich Co.* v. *Industrial Lumber Co.,* 417 U.S. 116, 219.

FOR ARGUMENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

NEITHER RESPONDENTS NOR *AMICI CURIAE* SERIOUSLY DISPUTE ROADWAY'S ARGUMENT THAT "COSTS" UNDER SECTION 1927 MUST BE DETERMINED BY REFERENCE TO THE DEFINITIONS OF "COSTS" PROVIDED BY OTHER STATUTES AND OTHER AUTHORITY.

Roadway submits that little difference exists between the framework for analysis used by respondents and *amici* United States and EEOC, and the framework for analysis

employed by Roadway for construing the statutes involved in this case. That is, Roadway, respondents and *amici curiae* agree that, standing alone, 28 U.S.C. § 1927 provides only that undefined "costs" may be assessed. *Pet. Br.* at 17; *Resp. Br.* at 11; *Gov't. Br.* at 10.[1] The definition of the term "costs" in section 1927 thus may be determined only by reference to statutes or other authorities which do specify whether a particular expense is a taxable cost.

II.

IN DETERMINING THE DEFINITION OF "COSTS" UNDER SECTION 1927, A COURT MAY REFER TO ALL COST-DEFINITION STATUTES AND AUTHORITY, NOT JUST 28 U.S.C. §§ 1920 AND 1923.

The consensus, however, breaks down over the question of whether a court may refer to only two cost-definition statutes, 28 U.S.C. §§ 1920, 1923, or a court may refer to all cost-definition statutes and authority applicable to the case in determining whether a particular expense is a taxable cost, and thus a "cost" for purposes of section 1927. Respondents and *amici curiae* contend that reference is limited to sections 1920 and 1923, and to no other statutes. *Resp. Br.* at 11-12; *Gov't. Br.* at 10. Roadway maintains that reference may be made to all applicable cost-definition statutes and authority. *Pet. Br.* at 17.

Nowhere in their briefs do respondents or *amici curiae* claim that attorneys' fees are not taxable costs in Title VII and 42 U.S.C. § 1981 actions. Nor in the face of

[1] Citations to "*Pet. Br.*" refer to the Brief for the Petitioner. Citations to "*Resp. Br.*" refer to the Brief for Respondents. Citations to "*Gov't. Br.*" refer to the Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae.

this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678, 696-697 (1978), could a contrary argument reasonably be made. Instead, respondents and *amici curiae* essentially contend that, even though attorneys' fees technically are taxable costs in Title VII and 42 U.S.C. § 1981 actions, the Court should ignore this fact in construing section 1927's application to attorneys in such cases. They argue, in effect, that sections 1927, 706(k) and 1988 should not be enforced according to their plain meaning because to do so would produce "absurd or futile results" or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'" *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 543 (1940).

A. Deterrence

Amici United States and EEOC in particular attack Roadway's construction of the three statutes on the theory that such an interpretation "would increase the financial hazard facing counsel for plaintiffs in such suits." *Gov't. Br.* at 13. The Government argues that "[i]t would surely be anomalous if the 'private-attorney-general concept' were to subject counsel for those enforcing the public policy to special hazards." *Id.* at 14-15 (citation omitted).[2] To the contrary, it is the Government's position which is "anomalous."

First, despite Government contentions in the instant case, a Justice Department official recently testified before Congress in support of proposed amendments to section 1927 which would specifically include attorneys' fees as

[2] In light of the Government's apparent concession that at least some "costs" may be assessed against plaintiff's attorneys under § 1927, *i.e.* those taxable costs enumerated in 28 U.S.C. §§ 1920, 1923, see *Gov't. Br.* at 10, the financial "hazards" argument presumably rests upon the potential dollar amount of the assessment, and not an absolute theoretical prohibition of all monetary assessments.

section 1927 "costs" in all cases.[3] Specifically, the Government opined that the amendments "would provide a meaningful disincentive to unreasonable delay in complex litigation." *Antitrust Procedural Act of 1979: Hearings on S. 390 Before the Subcommittee on Antitrust and Monopoly*, 96th Cong., 1st Sess., at 8 (1979) (statement of John H. Shenefield) [hereinafter cited as "*Senate Antitrust Hearings*"]. In the Government's view, the effect of fee awards against attorneys under section 1927 would be to encourage litigants and attorneys of limited means.[4] Thus, the Government advises this Court that public policy precludes acceptance of Roadway's construction of section 1927 while, at the same time, the Government lobbies for amendments to section 1927 which would accomplish the precise result Roadway submits, in this case, already can be reached under the existing language of the statute. The Government's representations to Congress on the one hand and to this Court on the other certainly represents an incongruous explanation of the public interest.

[3] See *Pet. Br.* at 16 n.13. Since its decision in the instant case, the Fifth Circuit has issued a rather confusing decision which may stand for the proposition that attorneys' fees may be assessed under § 1927 against attorneys who file frivolous appeals. *Self* v. *Self*, No. 79-1569, slip op. at 4352 (5th Cir. April 2, 1980). The court's decision in the instant case is not cited in *Self*.

[4]

> Such unjustified behavior delays the adjudication of legitimate claims and defenses, unnecessarily increases costs to the litigants, and squanders limited judicial resources. Sometimes it may coerce parties to settle litigation simply to escape needless expenses and frustration. This potential for abuse makes it difficult for the less wealthy to protect their interests through the courts and thereby creates public cynicism towards the judicial system.

Senate Antitrust Hearings, *supra*, at 8 (statement of John H. Shenefield). *See also id.* at 14 ("Unfortunately, the statute [§ 1927] has been underutilized and has received varying restrictive interpretations in the courts.").

Second, Roadway acknowledges that its construction of the statutes involved in this case could, and hopefully will, deter some lawyers from conducting frivolous and vexatious civil rights litigation. Irresponsible civil rights lawyers, like irresponsible lawyers generally, serve only to detract from the success of the litigation, extort settlements, clutter the courts, and create such widespread distrust of the motives for such suits that the serious and important issues they often raise may be clouded by attorney-provoked cynicism. Deterrence is a necessary and proper purpose of the statute.[5]

Third, completely overlooked by *amici* and respondents is the overall effect of the court of appeals' decision on the individual litigant, who, by any standard, was intended by Congress to have the widest possible latitude in vindicating his civil rights. Whatever the relative percentage, responsibility for at least some vexatious Title VII litigation lies with the plaintiff's lawyer. The court of appeals' decision leaves, as a matter of law, sole economic responsibility for these cases with the plaintiff. That result is fundamentally unfair.

Finally, the Government's policy arguments overlook the potential benefits of attorney liability for the civil rights plaintiff. Fair employment practice litigation, like antitrust cases, frequently involves complex questions of procedure, liability and relief. As in antitrust cases, see *Senate Antitrust Hearings*, *supra*, the potential for abuse is always present. Just as it cannot be presumed that all members of the plaintiff civil rights bar conduct such litigation reasonably and responsibly, nor can it be pre-

[5] Since it apparently is appropriate to provide extra incentives to plaintiff's counsel in the form of bonuses for efficient, professional advocacy, *e.g.*, *Parker* v. *Califano*, 20 Fair Empl. Prac. Cas. 1522, 1525-26 (D.D.C. 1978), it would also seem appropriate to have available disincentives to counsel who unreasonably and vexatiously increase costs.

sumed that all members of the defense civil rights bar conduct themselves responsibly. Attorneys' fees liability under section 1927 would extend with equal force to defense counsel who unreasonably and vexatiously multiply the proceedings. Defense counsel's knowledge that he, rather than the defendant, may be held responsible for the economic consequences of such conduct would create a "chilling" effect on defense counsel's conduct to the same degree as it would on plaintiff's counsel. Insofar as litigation may have been thwarted by defense counsel's conduct, private enforcement of the civil rights statutes would be expedited.

B. Avoiding the "Hostile Judge"

Amici United States and EEOC also contend that

> there is a substantial risk that permitting judicial discretion to assess attorney's fees against plaintiff's counsel in civil rights cases would be perceived as creating a risk for any such counsel appearing before a hostile judge.

Gov't. Br. at 14.[6] Although the term "hostile" is not expanded upon by the Government, it must be presumed from the context in which it appears that the hostility relates to perceived judicial antipathy toward civil rights cases. Like the deterrence argument, absolutely no support is offered by the Government for its view of the

[6] *In re Primus*, 436 U.S. 415 (1978), and *NAACP* v. *Button*, 371 U.S. 415 (1963), cited by the Government in support of the above-quoted proposition, have absolutely nothing to do with this case. Access to the courts, the First Amendment, and rights of association are not at issue in this case.

Respondents also insert a vague reference to the asserted First Amendment right of litigants to effective counsel in civil cases. *Resp. Br.* at 16. Whether respondents Piper, Brown and Stromile somehow violated their clients' First Amendment rights is not before the Court.

federal judiciary.[7] In any event, the argument fails to recognize that

> while it was certainly the policy of Congress that Title VII plaintiffs should vindicate "a policy that Congress considered of the highest priority," . . . it is equally certain that Congress entrusted the ultimate effectuation of that policy to the adversary process.

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412, 419 (1978) (citations omitted). It would indeed have been anomalous for Congress to entrust the federal judiciary with a national policy "of the highest priority" if Congress had not trusted the judiciary's discretion in effectuating that policy and in fairly treating attorneys employed as the policy's advocates.

Even assuming the validity of the Government's theory, it does not follow that the discretion should be withheld. Unless the "hostile judge" theory extends above the district court level, review of section 1927 assessments in the courts of appeals and in this Court is certainly available. Moreover, in assertedly extreme cases, plaintiff's counsel may request that the hostile judge recuse himself or herself from consideration of the case. *E.g.*, *Marshall* v. *Georgia Pac. Corp.*, 22 Fair Empl. Prac. Cas. 132 (E.D Ark. 1980).

The Government submits that, given the existence of the hostile judge, broader enforcement of the civil rights laws will be achieved by limiting the wrath of the hostile judge to the "litigant who may appear before that judge once in a lifetime," *Gov't. Br.* at 14, and thus excluding the

[7] *Cf. Ferri* v. *Ackerman*, No. 78-5981, slip op. at 8 n.17 (U.S. Dec. 4, 1979) ("But respondent has not directed our attention to any empirical data . . . to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants . . . .").

"lawyer who must practice [repeatedly] before a hostile judge." *Id.* The Government thus suggests that sacrificing the plaintiff, a mere visitor in the halls of justice, to the hostile judge is preferable to exposing the plaintiff's lawyer. Roadway's only response to such suggestions is to restate the arguments in such a manner that their fundamental defects may be observed. These defects amply support Roadway's position that placing some responsibility on attorneys does not lead to the absurd or unreasonable results which the Government argues are portended by the plain meaning of the statutes involved in this case.

C. The Merit-Conduct Distinction

Both respondents and *amici curiae* urge the Court to drive an artificial wedge between section 1927, and sections 706(k) and 1988 based upon section 1927's asserted limitation to "the manner in which the suit is litigated," *Gov't. Br.* at 12, and the claimed restriction of sections 706(k) and 1988 to "the merit of the suit itself." *Id; accord, Resp. Br.* at 14-15.[8] From this distinction, it is argued that, since the district court in the instant case was precluded by the attorneys' vexatious conduct from making a complete determination relative to the merit of the plaintiffs' claims, attorneys' fees were not awardable under sections 706(k) and 1988.

[8] Such arguments for restricting attorneys' fee liability under the civil rights acts have been frequently made to this Court and have been consistently rejected. *See Hutto* v. *Finney*, 437 U.S. 678, 696-97 (1978) (state not exempted by the Eleventh Amendment); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420-22 (1978) (plaintiff not exempted); *id.* at 422 n.20 (noting that the United States has abandoned its arguments that the federal government is exempted by 28 U.S.C. § 2412); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401 (1968) (per curiam) (defendant's good faith not a defense). Under the theories advanced by respondents and *amici curiae*, attorneys alone would enjoy immunity.

The asserted limitation of sections 706(k) and 1988 to the "merit" of a claim is shallow at best. Since the court is precluded from considering the manner in which the case was conducted in exercising its discretion as to attorneys' fees, the limitation presumes that unreasonable, vexatious litigation of a valid claim should be protected. The limitation also ignores the fact that unreasonable and vexatious conduct can, as in the instant case, prevent any determination of the claim's merit. Consequently, under the merit-conduct distinction, vexatious conduct is essentially transformed into a defense to an award of attorneys' fees under sections 706(k) and 1988.

The effects of the merit-conduct distinction are illustrated best by application. In *EEOC* v. *Datapoint Corp.*, 570 F.2d 1264 (5th Cir. 1978), for example, after lengthy pre-trial proceedings, the EEOC, "on the morning of the trial," *id.* at 1272, dismissed "without prior notice to either the Defendant or to the Court," [9] "not less than 90% of the case it originally filed." [10] Remanding the district court's judgment of attorneys' fees against the EEOC for further consideration in light of the Court's recently-issued decision in *Christiansburg*, the court observed, *obiter dictum*, that

> it is apparent to us that attorneys' fees in this case might be due the defendant for being required to defend against that part of plaintiff E.E.O.C.'s claim which was dismissed by the E.E.O.C. on the morning of trial.

570 F.2d at 1271-72. Since the merits of the dismissed claims were not decided in *Datapoint*, under respondents' and *amici's* construction of sections 706(k) and 1988, such

[9] 457 F. Supp. 62, 66 (W.D. Tex. 1978) (opinion on remand).
[10] 457 F. Supp. at 66.

abuses would be excluded from consideration as a basis for an award of attorneys' fees under those statutes.[11]

Despite claims by respondents and *amici curiae* that the merit-conduct distinction is apparent on the face of the statutes, the fact of the matter is that "[t]he terms of section 706(k) provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorneys' fees." *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 418 (emphasis in original). Instead, "equitable considerations" define the circumstances. *Id.* Congress certainly did not intend for the civil rights acts to protect abuses of the judicial process[12] through a contrived distinction between the merit of a claim and the manner in which it is litigated. Congress intended " 'to discourage frivolous suits,' " *id.* at 420, *quoting* 110 Cong. Rec. 14214 (1964) (remarks of Sen. Pastore), an intent which cannot reasonably be construed to exclude frivolous, vexatious multiplication of the suit

[11] Certainly the conduct of the litigation is a proper consideration in awarding attorneys' fees to a prevailing plaintiff. *See generally Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717-20 (5th Cir. 1974). Likewise, it would seem that plaintiff's counsel's vexatious conduct of the litigation falls within the "special circumstances" exception noted in *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968) (per curiam). There is thus no reason to exclude plaintiff's counsel's conduct from the court's discretion in awarding fees to a defendant.

[12] Sufficient abuse of the judicial process could overwhelm the courts and destroy the judicial system as an effective branch of government. This, and any discernible degree thereof, such as the bad faith litigation found here, the courts have a constitutional duty to prevent. By our interpretation of the statute involved [section 706(k)] we have found here no intent of Congress to permit any abuse of the judicial process.

Copeland v. *Martinez*, 603 F.2d 981, 992 n.69 (D.C. Cir. 1979), *cert. denied*, 48 U.S.L.W. 3465 (U.S. Jan. 21, 1980) (No. 79-647).

proceedings. Neither section 706(k) nor section 1988 is couched in terms of "merit costs" and "conduct costs." The statutes provide only for attorneys' fees "as part of the costs." [13]

The conduct of the litigation is an appropriate guide to the district court's discretion whether to award costs, including attorneys' fees, to a defendant. Since the plaintiffs in this case were "bound by the acts of [their] lawyer-agent," *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 (1962), the costs of the attorneys' misconduct could have been assessed against the plaintiffs. The district court properly shifted those costs, including attorneys' fees, to the attorneys pursuant to section 1927.

III.

ATTORNEYS' FEES ALLOWABLE UNDER THE "BAD FAITH" EXCEPTION TO THE AMERICAN RULE MAY BE SHIFTED FROM A PARTY TO HIS ATTORNEY UNDER SECTION 1927.

Respondents and *amici curiae* acknowledge that the " 'bad faith' exception to the 'American rule' allows an award of fees against the party." *Resp. Br.* at 18; *accord*,

[13] Respondents and *amici curiae* suggest that Roadway overlooks the fact that this Court's opinion in *Christiansburg Garment Co.* v. *EEOC*, *supra*, focused on the merit of the plaintiff's claim. Roadway agrees that *Christiansburg* did focus on the merit of the claim but disagrees that the facts of that case control the question of whether a merits-conduct distinction is present in the statutes. The question was not presented in *Christiansburg*.

Simply stated, *Christiansburg* held that the merit of the plaintiff's claim is an appropriate guide to the district court in exercising its discretion to award attorneys' fees to a defendant. Nowhere in its opinion did this Court preclude the district court from considering the conduct of the litigation in exercising its discretion.

Gov't. Br. at 15-16. They overlook, however, the agency relationship between attorney and client, and the fact that attorneys' actions, *e.g.*, misconduct in litigation, may be imputed to the client. *Link* v. *Wabash R.R.*, *supra*, 370 U.S. at 634. Again, section 1927 authorizes the court to shift costs, and thus attorneys' fees, which may be imposed on the client to the attorney.

IV.

NONE OF THE OTHER MISCELLANEOUS CONTENTIONS BY RESPONDENTS AND *AMICI CURIAE* SUPPORT AFFIRMANCE.

A number of contentions are made by respondents and *amici curiae* which warrant only a short reply.

First, it is contended that the legislative history of section 1927 compels the conclusion that section 1927 "costs" were intended to include only those expenses "precisely defined in 28 U.S.C. 1920 and 1923." *Gov't Br.* at 9; *accord*, *Resp. Br.* at 10. Assuming *arguendo* the validity of that conclusion, respondents and *amici curiae* overlook the fact that "Congress [may] amend its definition of taxable costs." *Hutto* v. *Finney*, *supra*, 437 U.S. at 696. That is precisely what Congress did when it enacted sections 706(k) and 1988, which include attorneys' fees "as part of the costs."

Second, *amici* United States and EEOC argue that "there is no indication in their legislative history [*i.e.* sections 706(k) and 1988] that Congress intended to modify the settled interpretation of Section 1927." *Gov't. Br.* at 11. What this "settled interpretation" is, the Government does not state. Roadway submits that the only interpretation of section 1927 that may be considered "settled" is Congress' citation, in the 1948 Judicial Code recodification, of *Motion Picture Patents Co.* v. *Steiner*, 201

F. 63 (2d Cir. 1912), and the limitation of section 1927 in that case to "taxable costs." *Id.* at 65. See H.R. Rep. No. 308, 80th Cong., 1st Sess. A164 (1947). The Government discusses neither *Steiner* nor the 1948 amendments in its brief.

Third, respondents and *amici curiae* fail to recognize those decisions holding that Congress is presumed to know of the existence of its prior legislation and to pass subsequent statutes with full knowledge of the preceding provisions, particularly when both the prior and subsequent act concern the same subject; in this case: "costs."[14] Accordingly, when Congress passed sections 706(k) and 1988, thus including attorneys' fees "as part of the costs" in certain cases, Congress is presumed to have had knowledge of section 1927's existence and obvious operation.

Fourth, Roadway agrees with the Government that

> words in a statute that have "a well known meaning ... in the law of this country ... are presumed to have been used in that sense unless the context compels to the contrary."

Gov't. Br. at 10, *quoting Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978). Congress clearly intended for attorneys' fees to be awardable "as part of the costs" in sections 706(k) and 1988. Moreover, in civil rights legislation, the fact that "costs" include attorneys' fees is certainly a "well known

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[14] *See, e.g., Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) ("[W]henever Congress passes a new statute, it acts aware of all previous statutes on the same subject.").

meaning" attached to the term.[15] Consequently, there is no reason to depart from the accepted definition of the word "costs" in Title VII and 42 U.S.C. § 1981 actions in determining the definition of "costs" in section 1927.

Respectfully submitted,

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[15] The "as part of the costs" language in § 706(k) and § 1988 is hardly an accident. Petitioner's review of the United States Code discloses that attorneys' fees are provided for in 58 statutes. Of these 58 statutes, five allow costs "together with" attorneys' fees, 17 allow attorneys' fees separate from costs, 21 allow costs "including" attorneys' fees, and 15 allow attorneys' fees "as part of the costs." Seven of the 15 statutes which allow attorneys' fees "as part of the costs" are provisions of various "civil rights" and "employment rights" statutes. Education Amendments of 1978, 20 U.S.C. § 3205 (*inter alia*, protection from discrimination on the basis of race, color or national origin in elementary and secondary education); Jury System Improvements of 1978, 28 U.S.C. § 1875 (protection of jurors' employment); Voting Rights Act of 1965-Extension, 42 U.S.C. § 1973*l*(e) (protection of "voting guarantees of the fourteenth or fifteenth amendments"); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (protection of numerous civil rights); The Civil Rights Act of 1964, Title II, 42 U.S.C § 2000a-3(b) (protection against discrimination or segregation in places of public accommodation); Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k) (protection against employment discrimination on various grounds); Railway Labor Act, 45 U.S.C. § 153(p) (disputes between employees and carriers).

FOR ARGUMENT

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No. 79-701

In the Supreme Court of the United States

OCTOBER TERM, 1979

ROADWAY EXPRESS, INC., PETITIONER

v.

J. D. MONK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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OPINIONS BELOW

The opinion of the court of appeals is reported at 599 F.2d 1378. The opinion of the district court is reported at 73 F.R.D. 411.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1979. The petition for a writ of cer-

tiorari was filed on October 31, 1979, and was granted on January 7, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court may require counsel for plaintiffs in an unsuccessful civil rights suit to pay the fees of opposing counsel.

STATUTES INVOLVED

28 U.S.C. 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 * * *, or in any civil action or proceedings, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 * * *, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 706(k) of Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission is the federal agency responsible for administering, interpreting, and enforcing federal employment discrimination statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Private employment discrimination suits provide the Commission with essential assistance in the enforcement process. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Any undue increase in the risks in bringing such suits accordingly would adversely affect the Commission's responsibilities. The Commission is concerned that the imposition of extraordinary sanctions on counsel who engage in civil rights litigation would have a chilling effect on enforcement of federal civil rights statutes. Cf. *NAACP* v. *Button*, 371 U.S. 415, 435-436 (1963).

In addition, if this Court were to adopt petitioner's analysis, attorney's fees could be assessed personally against any attorney who undertook to represent a party seeking to enforce any of a wide variety of

statutes granting or protecting various federal rights that include explicit provisions for the allowance of attorney's fees.[1] The chilling effects of such a decision accordingly could extend far beyond the field of civil rights.

STATEMENT

This action was brought on behalf of three named plaintiffs and a class of black employees and applicants, alleging that Roadway Express Company and Local 194, International Brotherhood of Teamsters, had engaged in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5, and the Civil Rights Act of 1866, 42 U.S.C. 1981.

Roadway Express moved to dismiss one of the named plaintiffs for failing to appear at his deposition and to dismiss the other plaintiffs for failing to file answers to interrogatories by the time fixed by the magistrate. As part of its request for sanctions under Fed. R. Civ. P. 37(d), Roadway asked for costs and attorneys' fees (R. 343).[2]

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[1] *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 260 n.33 (1974), contains a list of approximately thirty federal statutes that contain such provisions.

[2] Fed. R. Civ. P. 37(d) provides in pertinent part:

> If a party * * * fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, * * * the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may * * * require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

After granting both motions to dismiss (R. 704), the district court assessed attorneys' costs and fees in favor of Roadway for the entire litigation. The court assessed these fees against respondents, plaintiffs' counsel, but not against plaintiffs themselves (Pet. App. 9a-10a).[3] The court imposed the sanction on counsel on the grounds that they had been dilatory[4] and had "improvidently enlarged" (Pet. App. 27a) the complaint to a class action without properly advising the named parties concerning their "responsibilities and liabilities as class representatives" (Pet. App. 22a). The court based its award on 28 U.S.C. 1927, read in conjunction with the Civil

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[3] The petition identified as respondents both the plaintiffs below (J.D. Monk, Percy Green, and Robert McPherson) and their counsel (Robert E. Piper, Jr., Frank E. Brown, Jr., and Bobby Stromile). Only the counsel respondents have filed opposing briefs. We will accordingly refer to them as respondents.

[4] The court identified, in addition to the failure to appear for the deposition and the delay in responding to interrogatories upon which petitioner's motions were based, the late filing of a brief (Pet. App. 17a-19a). The court's original ruling indicated that this brief was never filed (Pet. App. 16a, 19a). The court subsequently amended its ruling to indicate that a brief, which it found inadequate, was filed late (Pet. App. 12a).

Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988, and Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k) (Pet. App. 22a-27a).[5]

The court of appeals vacated the district court's judgment and remanded for a reassessment of the costs. It found no clear error in the district court's conclusion that respondents had vexatiously multiplied the proceeding sufficiently to merit requiring them to pay the excess costs as provided by 28 U.S.C. 1927 (Pet. App. 4a-5a). But the court held that there was no authority to include attorneys' fees as part of those costs.

Relying on *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714 (1967), the court reasoned that "[t]o read § 1927's provision for 'costs' as including an award of attorneys' fees would require us to ascribe to Congress a purpose to vary the meaning of that term without either statutory language or legislative history to support the unusual construction" (Pet. App. 6a). The court held that Sections 2000e-5(k) and 1988 provide for the award of attorney's fees against parties only, not against counsel; these provisions may not be combined with "those of § 1927 to produce a hybrid result contemplated by none of the statutes" (Pet. App. 8a). The court accordingly

[5] Section 1927 permits a court to require an attorney who "so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously" to "satisfy personally such excess costs." Sections 1988 and 2000e-5(k) permit the court to award to the prevailing party in specified civil rights litigation "a reasonable attorney's fee as part of the costs."

remanded the case to the district court for the determination of a proper award under Section 1927, emphasizing that the award was also to be limited to the "*excess* costs caused by [respondents'] vexatious behavior * * * and not for the total costs of the litigation" (Pet. App. 8a).

INTRODUCTION AND SUMMARY OF ARGUMENT

An attorney who "multiplies the proceedings in any case [in such a way] as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs." 28 U.S.C. 1927. The precise question at issue in this case is whether the "costs" to which Section 1927 refers are only those defined in 28 U.S.C. 1920 and 1923, or whether they also include attorney's fees that may be allowed to the prevailing party "as part of the costs" in certain civil rights litigation by virtue of 42 U.S.C. 2000e-5(k) and 42 U.S.C. 1988. We submit that the conclusion that Section 1927 does not authorize the award of attorney's fees is more consistent with the statutory schemes and purposes of both the statutory fees and costs provisions and the civil rights acts, and with accepted canons of statutory construction. Since Congress has provided for the recovery of counsel fees by the prevailing party principally in cases in which it wished especially to encourage suits by "private attorneys general" to enforce federal rights, it would be peculiarly inappropriate to subject precisely those counsel who agree to prosecute such suits to the risk of special sanctions. Finally, *Alyeska*

Pipeline Co. v. *Wilderness Society*, 421 U.S. 240 (1975), indicates that the judiciary has no inherent power independent of Section 1927 (and Fed. R. Civ. P. 37) to require counsel to pay attorney's fees.

ARGUMENT

I. ATTORNEY'S FEES MAY NOT BE ASSESSED UNDER 28 U.S.C. 1927

The somewhat archaic language of Section 1927 reflects its origination in 1853, when it was part of the same statute from which Sections 1920 and 1923 are also derived (10 Stat. 161).[6] That statute, entitled "An Act to Regulate the Fees and Costs to be Allowed Clerks, Marshals, and Attorneys of the Circuit and District Courts of the United States, and for other Purposes", had as one of its primary purposes the *limitation* of the fees and costs that had previously been recoverable by the prevailing party.[7]

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[6] An earlier statute, using similar language, had been enacted in 1813. 3 Stat. 21. (For its legislative history, see 26 Annals of Cong. 43, 54, 57, 446, 456, 469 (1813-1814)). The present provision is derived directly from the 1853 Act, appearing as R.S. 982 in the 1874 codification, as Section 829 in Title 28 of the Code of the Laws of the United States in 1926, and as Section 1927 in the 1948 Code revisions. See generally *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 255-256 & nn. 26-29 (1975). No explanatory legislative history accompanies the reenactments.

[7] The House Judiciary Committee Report, H.R. Rep. No. 50, 32d Cong., 1st Sess. 6 (1852), stated that the bill was designed to "equalize [costs]—make them uniform—make the law explicit and definite, so as to prevent abuses arising from

The only costs recoverable under that Act are accordingly precisely identified in 28 U.S.C. 1920 and 1923. *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 250-257 (1975).

The Act began with the general provision that "in lieu of the compensation now allowed by law to attorneys * * * the following and no other compensation shall be taxed and allowed."[8] 10 Stat. 161. It established the maximum attorney's fees to be recovered as costs in federal litigation[9] and limited the fees and costs to be paid to court officers, witnesses, jurors, and printers. These maximums, in modified form, still limit fees and costs in federal litigation. See *Alyeska Pipelines Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 255.

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ingenious construction—to cut off all constructive services—to discourage unnecessary prolixity, old useless forms, and the multiplication of proceedings, and the prosecutions of several suits which might be better joined as one." See also Cong. Globe, 32d Cong., 1st Sess. 2157 (1852) (statement by Representative Mann); *id.* at 2127 (statement by Representative Mead) *id.* at 207 (statement by Senator Bradbury). The 1853 statute, therefore, was to achieve its dual purposes by making counsel responsible for paying the costs and fees of multiple litigation while, at the same time, limiting recoveries to the maximum amounts specified in the statute.

[8] While the quoted language no longer appears in the Code, the Court noted in *Alyeska Pipeline Co., supra*, 421 U.S. at 256 n.29, that "nothing in the * * * Code indicates a congressional intent to depart from that rule."

[9] These fees are the "attorney's and proctor's docket fees" specified in 28 U.S.C. 1923. *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 257 & n.30.

Even in the absence of the strong pari materia argument available here, this Court has consistently held that, in the absence of an express reference to attorney's fees, federal legislation allowing the recovery of "costs" authorizes the assessment only of the items listed in 28 U.S.C. 1920 and 1923. See, *e.g.*, *The Baltimore*, 75 U.S. (8 Wall.) 377, 399 (1869); *Flanders* v. *Tweed*, 82 U.S. (15 Wall.) 450, 452-453 (1872); *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, *supra*, 386 U.S. 714, 720 (1967). That result is particularly appropriate here, in light of the common derivation of the three statutes. See *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972); *Clafin* v. *Commonwealth Ins. Co.*, 110 U.S. 81, 92-93 (1884). Cf. *Marks* v. *United States*, 161 U.S. 297, 302 (1896) (consistent use of a term in legislation "suggests * * * a single and settled meaning"); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978) (words in a statute that have "a well known meaning * * * in the law of this country * * * are presumed to have been used in that sense unless the context compels to the contrary").

II. THE AVAILABILITY OF ATTORNEY'S FEES TO CERTAIN PREVAILING PARTIES IN CIVIL RIGHTS SUITS DOES NOT PERMIT THE ASSESSMENT OF THOSE FEES AGAINST COUNSEL PERSONALLY

Petitioner concedes that Section 1927 does not itself authorize the assessment of attorney's fees against opposing counsel. Petitioner claims instead that "Section 1927 simply provides for a shifting of

responsibility for the payment of costs authorized by other statutes applicable to the case or other authority available to the court" (Br. 17). But the "other statutes" on which petitioner relies (42 U.S.C. 2000e-5(k) and 42 U.S.C. 1988) cannot reasonably be interpreted to permit such a shifting, and there is no indication in their legislative history that Congress intended to modify the settled interpretation of Section 1927.[10] Instead, these statutes are designed to serve quite a different purpose; interpreting them in the way petitioner suggests would subvert that purpose.

As this Court explained in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420-421 (1978), Congress permitted prevailing defendants in civil rights suits to recover attorney's fees in order to discourage plaintiffs from bringing suits that are "frivolous, unreasonable, or without foundation." [11] In contrast,

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[10] The implied modification of the settled construction of an earlier statute by a subsequent one is not favored. *United States* v. *Madigan*, 300 U.S. 500, 506 (1937). If Congress wishes to modify Section 1927, it is perfectly capable of doing so expressly. See note 18, *infra*; cf. Fed. R. Civ. P. 37.

[11] We note that the district court here did not find that plaintiffs' suit itself met that test. Indeed, that court stated that counsel's actions prejudiced plaintiffs "by jeopardizing their claims," and that those claims were sufficiently substantial to require defendants' counsel to prepare "for what appeared to be a most serious law suit" (Pet. App. 27a). Moreover, since EEOC had determined that there was reasonable cause to believe petitioner had violated Title VII in its hiring practices (C.A. App. 397), the suit could scarcely be considered without merit under the *Christiansburg* standard. The district court did state that counsel improperly

Section 1927 permits the award of costs against counsel who "multiplies proceedings in any case [so] as to increase costs unreasonably and vexatiously." The award of costs under the civil rights Acts turns on the merit of the suit itself, while an award under Section 1927 turns on the manner in which the suit is litigated. This difference apparently reflects congressional appreciation of the division of responsibility between client and counsel in litigation—the client being primarily responsible for the decision to sue, while counsel bears the primary responsibility for the manner in which the suit is conducted.[12] The two statutes accordingly are addressed to two entirely different situations: on the one hand, misconduct by a *party* in bringing suit, and on the other, misconduct by *counsel* in the conduct of the suit. It

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"broaden[ed] the case into a class action", thus "improvidently enlarg[ing]" it (Pet. App. 27a). However, even if the excess costs attributable to such "enlargement" might properly be assessed against plaintiffs or their counsel under 42 U.S.C. 2000e-5(k) or 42 U.S.C. 1988, it is far from clear that those costs were significant. The scope of discovery in employment discrimination suits is generally the same whether or not the action is brought as a class action. See *Burns* v. *Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

[12] This perception of counsel's responsibility for the manner in which the suit is litigated is also reflected in the provision in Fed. R. Civ. P. Rule 37, which permits the assessment against counsel of the costs of failures to proceed properly in discovery. Some of the improprieties of counsel the district court identified here would arguably justify an award of the excess costs of discovery under Rule 37 (see, *supra*, pages 4-5). And, of course, the contempt sanction is available for misconduct warranting its imposition.

is irrelevant to Section 1927 whether the suit itself has merit, as it is irrelevant to the fee provision of the civil rights Acts whether the suit is expeditiously litigated. Petitioner's interpretation overlooks this fundamental difference in the two statutory purposes.[13]

Even more significantly, that interpretation would undercut the congressional purpose in enacting the civil rights attorney's fees provisions. Congress was well aware of lawyers' reluctance to accept civil rights cases.[14] The fee provisions were designed to reduce that reluctance and thus to "make it easier for a plaintiff of limited means to bring a meritorious suit" (110 Cong. Rec. 12724 (1964) (Statement of Senator Humphrey explaining provision that became 42 U.S.C. 2000e-5(k)). But petitioner's interpretation of these statutes would have precisely the opposite effect, because it would increase the financial hazard facing counsel for plaintiffs in such suits.[15]

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[13] Petitioner suggests (Br. 9-11, 16 n.14) that its interpretation has the advantage of requiring the individuals responsible for its costs to compensate it for them. But Fed. Rule Civ. P. 37 permits petitioner to recover from respondents the excess costs resulting from their failures in discovery. In the absence of any finding that the suit itself was frivolous and without foundation petitioner is not, under *Christiansburg*, entitled to more.

[14] See S. Rep. No. 1011, 94th Cong., 2d Sess. 1-7 (1976); 122 Cong. Rec. 31851 (1976) (Statement by Senator Kennedy); *id.* at 32185 (Statement by Senator Tunney); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1-11 (1976).

[15] Petitioner's interpretation would not facilitate the recovery of attorney's fees by counsel for prevailing plaintiffs, since such costs are already awarded "unless special circum-

Although ideally there should be no increase in the hazard for lawyers who handle the litigation competently, in fact there is a substantial risk that permitting judicial discretion to assess attorney's fees against plaintiff's counsel in civil rights cases would be perceived as creating a risk for any such counsel appearing before a hostile judge. Cf. *NAACP* v. *Button*, 371 U.S. 415, 433-444 (1963); *In re Primus*, 436 U.S. 412, 431-439 (1978). Moreover, the threat of sanctions against a lawyer who must practice before a hostile judge is likely to be a substantially greater deterrent to civil rights enforcement than the threat of sanctions against a litigant who may appear before that judge once in a lifetime.

Petitioner's interpretation would increase the possible sanctions against counsel only in those situations in which Congress has specifically authorized the award of counsel fees to the prevailing party.[16] But as this Court has recognized "under some, if not most, of [these] statutes, * * * Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 263). It

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stances would render such an award unjust." *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400, 402 (1968); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975); *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

[16] The Court in *Alyeska Pipeline So.* v. *Wilderness Society, supra*, 421 U.S. at 260-261, n.33, identified approximately 30 federal statutes that contain such provisions.

would surely be anomalous if the very use of the "private-attorney-general concept" (*ibid.*) were to subject counsel for those enforcing the public policy to special hazards.

III. A FEDERAL COURT HAS NO INHERENT AUTHORITY TO REQUIRE COUNSEL FOR A LITIGANT TO PAY THE OPPOSING PARTY'S COUNSEL FEES

Petitioner's final argument is that the district court had inherent power to require respondents' counsel to pay petitioner's attorney's fees, either under "the 'bad faith' exception to the American rule" prohibiting assessment of costs against a losing party (Br. 19), or under the court's power to impose sanctions on attorneys as officers of the court (Br. 20). Neither argument has merit.

This Court summarized the "bad faith" exception as permitting a court to "assess attorneys' fees for the 'willful disobedience of a court order * * * as part of the fine to be levied on the defendant'; or when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Co.* v. *Wilderness Society, supra*, 421 U.S. at 258-259 (citations omitted). See also *Hutto* v. *Finney*, 437 U.S. 678, 689 n.14 (1978); *Christiansburg Garment Co.* v. *EEOC, supra*, 434 U.S. at 419. While the exception thus obviously applies to the bad faith of the *parties to the litigation*, not their counsel, petitioner suggests that it should be extended to permit the assessment of fees also against counsel who act in bad faith in conducting litigation. But

whatever the inherent power of a court might be in the absence of legislation,[17] Congress has provided specifically for the sanctions available in such circumstances by enacting 28 U.S.C. 1927 and Fed. R. Civ. P. 37. It is for Congress, not the courts, to decide whether, and to what extent, additional sanctions are necessary.[18] As the Court has noted, Congress has given no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* 421 U.S. at 260.

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[17] Petitioner's reliance (Br. 7, 19) on *Sprague* v. *Ticonic Nat'l Bank,* 307 U.S. 161 (1939), for the proposition that courts possess the inherent power to assess costs of litigation other than conventional taxable costs is inconsistent with this Court's analysis of that case in *Alyeska Pipeline Co.* v. *Wilderness Society, supra,* 421 U.S. at 258, as the dissenting opinion of Mr. Justice Marshall makes clear (*id.* at 279).

[18] The Senate has passed a bill that would amend Section 1927 to include attorney's fees within the costs that may be assessed against attorneys for their unreasonable conduct of litigation (S. 390, 96th Cong., 1st Sess. (1979), 129 Cong. Rec. 10117 (1979)). The bill was referred to the House Committee on the Judiciary on July 24, 1979 (125 Cong. Rec. H6549 (daily ed. July 24, 1979)). This bill would apply equally to all counsel in any federal litigation, rather than singling out those litigating civil rights cases or others in which plaintiffs are acting as private attorneys general.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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MARCH 1980

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,

Petitioner,

v.

J. D. MONK, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE*, OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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March 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-701

==========

ROADWAY EXPRESS, INC.,

Petitioner,

v.

J. D. MONK, et al.

==========

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

==========

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

==========

NAACP Legal Defense and Educational Fund, Inc. hereby moves for leave to file the attached brief as amicus curiae.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist black persons in securing their constitutional rights, and other rights, by prosecuting and defending lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and other courts as well as filed briefs amicus curiae. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Los Angeles County v. Associated General Contractors of California, 438 U.S. 909 (1978).

The Legal Defense Fund believes that its experience in litigation concerning attorney's fees and employment discrimination may be of assistance to the Court in the present case. See, e.g., Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Albemarle Paper Company

v. Moody, 422 U.S. 405 (1975); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). Accordingly, it requests permission to file the accompanying amicus curiae brief. Consent to the filing of the brief has been granted by counsel for respondents but has been refused by counsel for petitioner. The brief is submitted in support of respondents. It supports the arguments of respondents and the general analysis of the Court of Appeals below although the basis for its reasoning is different from that relied upon by respondents and the Court of Appeals. Because of this difference and the potentially adverse impact of improper application of 28 U.S.C. § 1927, and related provisions, upon the enforcement of civil rights statutes,*/ the movant submits that the brief should be accepted for filing by the Court.

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*/ See, e.g., Wheeler v. Anchor Continental, Inc., 20 FEP Cases 591 (D.S.C. 1978), appeal docketed, No. 79-1116 (4th Cir., Feb. 14, 1979); Plummer v. Chicago Journeyman Plumbers' Local Union No. 130, U.A., Civil No. 77 C 1726, Nov. 19, 1979 (N.D. Ill.); Flora v. Moore, 22 EPD ¶ 30,365 (N.D. Miss.), Dec. 8, 1979.

WHEREFORE, the NAACP Legal Defense and Educational Fund, Inc. respectfully prays that this motion be granted and that the attached brief be filed.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-701

==========

ROADWAY EXPRESS, INC.,

Petitioner,

v.

J. D. MONK, et al.

==========

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

==========

BRIEF AMICUS CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

==========

STATEMENT OF INTEREST

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit corporation incorporated under the laws of the State of New York. It was

formed to assist black persons in securing their constitutional rights, and other rights, by prosecuting and defending lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys for the Legal Defense Fund have represented parties in litigation before this Court and other courts as well as filed briefs amicus curiae. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971); Los Angeles County v. Associated General Contractors of California, 438 U.S. 909 (1978).

The Legal Defense Fund believes that its experience in litigation concerning attorney's fees and employment discrimination may be of assistance to the Court in the present case. See, e.g., Bradley v. School Board of City of Richmond, 416 U.S. 696 (1974); Albemarle Paper Company v. Moody, 422 U.S. 405 (1975); Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

SUMMARY OF ARGUMENT

The writ of certiorari should be dismissed as improvidently granted. Although this Court granted the writ for the sole purpose of determining the allowability of attorney's fees as excess costs under 28 U.S.C. § 1927, it is not possible to decide this issue in the present state of the record since both the Court of Appeals and the district court below erroneously assumed that § 1927 was applicable to the facts presented here. The record shows that the acts found by the court below to be unreasonable and vexatious were acts which were no more than failure to prosecute respondents' claims for relief. They were not acts which either multiplied the proceedings below or caused defendant to incur excess costs. Accordingly § 1927 is inapplicable.

The writ should also be dismissed as improvidently granted because of the nonfinal nature of the judgment by the Court of Appeals remanding the action to the district court to determine what, if any, excess costs were caused by respon-

dents' attorneys' unreasonable and vexatious acts or by any multiplication of the proceedings by them. If the district court, upon remand, concludes that no excess costs and no multiplication of proceedings were caused, then the granting of the writ of certiorari to determine the allowability of attorney's fees as excess costs under § 1927 will have been improvident.

If, in the alternative, the writ is not dismissed, then we submit that this Court should affirm in part and reverse in part. Insofar as the judgment remands the case to the district court for the purpose of determining whether excess costs were incurred by petitioner and whether excess cost resulted from respondents' attorneys' vexatious acts or alleged multiplication of the proceedings, the judgment, we submit, should be affirmed. To the extent, however, that the judgment rests on an assumption, in the absence of evidence, that respondent McPherson's failure to appear at his scheduled deposition was a multiplication of proceedings caused by respondents' attorneys, the judgment should reversed.

If the Court nonetheless decides to resolve the hypothetical issue in this case of whether attorney's fees can be assessed under § 1927, then, we submit, the Court should hold that attorney's fees are not items of costs within the meaning of § 1927. If the Court, however, holds that attorney's fees are allowable under § 1927, then we urge that it should hold further that their allowance as part of excess costs is discretionary and governed by standards normally applicable to an award of attorney's fees.

ARGUMENT

I. SECTION 1927 IS NOT APPLICABLE TO THE CONDUCT OF RESPONDENTS' ATTORNEYS

This Court granted petitioner's writ of certiorari for the limited purpose of determining whether attorney's fees are allowable as elements of excess costs under 28 U.S.C. § 1927. Necessarily, the Court assumed that this issue was presented by the record below and that § 1927 was applicable to the proceedings below. Because

this assumption is not consistent with the record, the petition for writ of certiorari should be dismissed as improvidently granted.

It is a guiding rule of this Court that it will neither render advisory opinions on hypothetical questions nor determine controversies which are not sufficiently definite and concrete to assure an immediate and definitive determination of the validity of conflicting claims presented by adverse parties.[1/] Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-241 (1937); United States v. Fruehauf, 365 U.S. 146, 157 (1961). Also see, Flast v. Cohen, 392 U.S 83, 92-101 (1968). Dismissal of the writ of certiorari as improvidently granted is proper therefore if necessary to effectuate this policy. The writ should also be dismissed as improvidently granted when "conditions originally thought to justify granting the writ of certiorari are not

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1/ The source of this policy is in Article III of the Constitution of the United States as well as in jurisprudential considerations. See Barrows v. Jackson, 346 U.S 249, 256-257 (1953); Flast v. Cohen, supra, 392 U.S at 92-101.

in fact present."[2/] Burrell v. McCray, 426 U.S 471, 473-74 (9176)(Brennan, J., dissenting). Both conditions exist here.

By the explicit terms of the statute, § 1927 is applicable only if the offending attorney has, in the course of litigation, (1) multiplied the proceedings, (2) increased the costs, (3) engaged in unreasonable and vexatious acts, and (4) caused excess costs to have been incurred as a consequence of the multiplication of the proceedings resulting from the unreasonable and vexatious acts.[3/] See e.g., Motion Pictures

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2/ In Triangle Involvement Council v. Ritchie, 402 U.S. 497, 502 (1971), Justice Harlan stated in his concurring opinion that a "changed posture of the case" could preclude its adjudication from being "a provident expenditure of the energies of the Court."

3/ The necessity for showing the existence of each of the four requirements has not always been clearly perceived. See Acevedo v. Immigration and Naturalization Service, 538 F.2d 918 (2d Cir. 1976) (assessment of double costs as excess costs). A more recent decision by the same court attempted to formulate standards applicable to § 1927. The court wrote that

> [I]n an action not itself brought in bad faith, an award of attorneys' fees should

Patents Co. v. Steiner, 301 F. 63, 64-65 (2d Cir. 1912). A finding of liability under § 1927 can therefore only be predicated upon an antecedent finding that each of these criteria is satisfied. In particular, it must be shown that the proceedings have been multiplied and that the multiplication resulted in excess costs being incurred by the opposing party. A mere showing that the attorney acted unreasonably and vexatiously is therefore insufficient to invoke § 1927.[4/]

The alleged vexatious and unreasonable acts committed by respondents' attorneys were described at length by the Court of Appeals.[5/] 599 F.2d at 1380-1381. These acts were termed vexatious by that court as well as by the district court. Like the district court, the Court of Appeals regarded these acts as being vexatious only insofar as they evidenced the failure of respondents' attorneys "to diligently pursue the plaintiffs' interests" and evidenced the cause for the "forced dismissal of the plaintiff's

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3/ cont'd

be limited to those expenses reasonably incurred to meet the other party's groundless, bad faith procedural moves.

Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1089 (2d Cir. 1977). Whether even this formulation is completely accurate is perhaps doubtful.

4/ A wide range of sanctions are available against an attorney who acts unreasonably and vexatiously. See 7 Am Jur, 2d, Attorneys at Law, §§ 12-43, 167-200; and Comments, Sanctions Imposed By Courts On Attorneys Who Abuse the Judicial Process, 44 Chi. L. Rev. 619 (1977).

5/ Respondents' attorneys were held by the district court to have acted unreasonably and vexatiously because of the following: (1) failure of respondent McPherson to appear for twice scheduled depositions; (2) failure to answer petitioner's interrogatories as ordered; (3) failure of respondents' attorneys to file a brief, as ordered by the district court, within 10 days of April 7, 1976; (4) filing a brief on June 1, 1976, more than ten days following the court's second order of May 19, 1976 to file a brief within ten days (the brief was alleged by the district judge to be inadequate because it "casually mention[ed]" a case which the judge wanted briefed and because it "presented no solid factual basis for distinguishing between that case" and the one before the court. (Ruling upon Motion For Rehearing, dated April 13, 1977); and (5) failure to advise respondents of their denomination as class representatives and of the possible financial consequences of the denomination.

claims."[6/] 599 F.2d at 81. The affirmance by the Court of Appeals of the district court's finding and conclusion that respondents' attorneys acted vexatiously thus reflects the Court of Appeals' view, as well as that of the district court, that respondents' attorneys acted vexatiously only insofar as they failed to prosecute their clients' case and caused the claims of their clients to be dismissed for nonprosecution.

Acts constituting a failure to prosecute are not, with respect to an action dismissed on that ground, cognizable under § 1927. Such acts by definition, do not result in a multiplication of proceedings. Perhaps, the requisite multiplication would have existed had the action not been aborted by respondents' attorneys' conduct. This issue, however, need not be decided since the

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6/ The opinion of the Court of Appeals makes it evident that it, and the district court, considered the failure to file briefs as ordered and the failure to communicate with the named plaintiffs concerning possible class representation as bearing only upon respondents' attorneys' failure to prosecute properly their clients' case. 599 F.2d at 1381.

action was in fact dismissed for nonprosecution. Petitioner benefitted from the dismissal rather than being harmed by it and necessarily, incurred no excess costs from failure to prosecute or dismissal. To reward petitioner with excess costs (irrespective of whether attorney's fees are included in the award) would not be in conformity with the statute but would reward petitioner twice over, once by dismissal of respondents' claims and once by an award of alleged excess costs. The absurdity of such a result is especially egregious since neither the district court nor the Court of Appeals found that respondents or their attorneys had vexatiously commenced the action. Each responsive action taken by petitioner in this lawsuit was triggered by nonfrivolous actions taken by respondents and their attorneys. Consequently, no multiplication of proceeding occurred[7/] and no

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7/ Multiplication of proceedings occurs when a frivolous action is commenced or a frivolous appeal is brought, See e.g. Hanley v. Condrey, 467 F.2d 697 (2d Cir. 1972); Browning Debenture Holders' Committee v. DASA, supra, 560 F.2d at 1088-1089, or when any frivolous action is taken which requires a response by the opposing party or

excess costs were incurred.

In holding that respondents' attorneys acted vexatiously in not prosecuting the underlying Title VII action, both lower courts considered the failure of respondents' attorneys to file a brief and the failure to advise their clients concerning the significance of instituting the action as a class action. The failure to file the required brief clearly did not multiply the proceedings or lead to excess costs. In a similar situation, the Third Circuit held that the failure to file a pretrial memorandum within the time limits did not cause the opposing party to incur excess costs. Gamble v. Pope & Talbot, Inc., 307 F.2d 729, 731, n.1 (3rd Cir. 1962) cert. denied, 371 U.S 888 (1962). Moreover, respondents' attorneys eventually did file a brief. See note 5, supra. In any event, no multiplication of the proceedings resulted from the failure.

7/ contd.
which puts that party to unnecessary expense. See Weiss v. United States, 227 F.2d 72 (2d Cir. 1955), cert. dneied, 359 U.S 936 (1956), rehearing denied 350 U.S. 977; Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir. 1968), cert. denied, 395 U.S. 908, rehearing denied 395 U.S. 987.

Similarly, no multiplication of the proceedings resulted from the initial effort to bring the action as a class action or from the alleged failure to advise the individual plaintiffs in detail about the significance of the class action. No evidence has been presented showing that a class action was improper or that respondents' attorneys were not initially entitled to rely upon their clients' assertion and belief that other blacks suffered similar racial discrimination at the hands of defendant. See excerpts from respondents' depositions 73 F.R.D. at 414-415, n.2. Moreover, neither the Court of Appeals nor the district court found that the purported effort to bring the action as a class action was frivolous or vexatious.[8/] Apart from the initial designation of the lawsuit as a class action, no attempt was made to seek a determination, pursuant to Rule 23(c) of the Federal Rules of Civil Pro-

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8/ Even if there were a possibility of construing the district court's decision as holding that respondents' attorneys acted vexatiously in attempting to bring the action as a class action, that portion of the district court's decision was not affirmed upon appeal. See the Court of Appeals' opinion at 599 F.2d at 1381.

cedure, that the action could be maintained as a class action.[9/] Finally, the finding that respondents' attorneys had not apprised respondents that costs, including attorney's fees, could conceivably be assesed against them, see Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421-422 (1978), did not demonstrate that respondents' attorneys had caused a multiplication of the proceedings or had caused petitioner to incur excess costs.[10/]

9/ The initial designation by respondents' attorneys of the action as a class action did not necessarily determine the permissible scope of respondents' interrogatories. See, e.g., Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377 (4th Cir. 1972), where the Fourth Circuit stated that prosecution of individual claims of racial discrimination may require examination of "statistics, patterns, practices and general policies to ascertain whether discrimination exists." 457 F.2d at 1382. Accord: Parham v. Southwestern Bell Telephone Co., 433 F.2d 421, 425 (8th Cir. 1970); Reed v. Arlington Hotel Co., Inc., 476 F.2d 721, 723 (8th Cir. 1973).

10/ In Surowitz v. Hilton Hotels Corp.,383 U.S. 363 (1966), this Court tentatively explored, in the context of a derivative suit under then Rule 23(b), the extent to which an attorney might be required to disclose to the client the nature of the lawsuit and the extent to which the client's

Moreover, the Christiansburg rule is applicable only when the action is frivolous or brought in bad faith.

Since respondents' attorneys' other alleged unreasonable and vexatious acts[11/] did not multiply the proceedings or cause excess costs, § 1927 is inapplicable to the facts of this case and the writ should be dismissed as improvidently granted.

10/ cont'd

ignorance of the circumstances of the lawsuit might, if ever, justify a dismissal of the client's complaint. 383 U.S at 371-374. Apart from stating the necessity for the attorney and the client to act in good faith, this Court only went so far, in the circumstances of that case, as to conclude that a plaintiff seeking to invoke the aid of the judicial process must only "have general knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges." 383 U.S at ft. 5.

11/ The failure of respondent's attorneys to appear at a 10:00 a.m. court meeting on April 21, 1976, was described in the docket sheet of the district court as due to "inadvertence." 73 F.R.D. at 412 (W.D. La. 1977).

Since no evidence was presented below showing that respondents' attorneys were responsible for respondent McPherson's nonattendance at his

The reason for dismissing the writ as improvidently granted is simply put. The decision of the Court of Appeals, while correct in concluding that attorney's fees are not allowable under § 1927, erred in assuming that § 1927 was applicable to respondents' conduct as found by the district court. Dismissal of the writ as improvidently granted would allow this Court to avoid compounding the error.

On the other hand, a failure to dismiss the writ as improvidently granted that is followed by an award of attorney's fees to petitioner, would imply that § 1927 is applicable to conduct consisting of a failure to prosecute. Moreover, it would raise serious questions concerning the scope and the proper application of § 1927. For example, it would raise questions concerning what type of conduct constitutes a multiplication of

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11/ cont'd

scheduled depositions, his failure to appear cannot be used to show that respondents' attorneys multiplied the proceedings. See Thompson v. Louisville, 362 U.S 199 (1960).

proceedings and what type of acts create excess costs. In addition it would invite doubt as to whether there was a need to make an evidentiary showing of a causal connection between the multiplication of the proceedings and the vexatious and unreasonable acts or to make a showing of a causal connection between these acts and the incurrence of excess costs. Finally, it would raise a basic question of whether the existence of excess costs can be inferred solely from the occurrence of vexatious acts.

In view of the confusion which already exists concerning the application of § 1927, see e.g., Hanley v. Condrey, 467 F.2d 697 (2d Cir. 1972); (the need for a hearing); Acevedo v. Immigration and Naturalization Service, supra (whether double costs can be imposed); Wheeler v. Anchor Continental, Inc., 20 F.E.P.C. 591 (D.S.C. 1978), appeal docketed, No. 79-1116 (4th Cir. Feb. 14, 1979) (whether excess costs, including attorney's fees, can be assessed in the midst of trial, whether oral argument satisfies the requirements for an evidentiary hearing, and whether particular

conduct is vexatious), adding another level of confusion might entirely overwhelm the effort to apply § 1927 in accordance with Congressional intent.

Besides these reasons, there is one further reason which requires dismissal of the writ. There is more than a substantial possibility that the district court, acting pursuant to the judgment of the Court of Appeals, will, upon remand, obviate any necessity for deciding the allowability of attorney's fees under § 1927. The likelihood is great since the record shows neither the existence of excess costs nor any multiplication of the proceedings. Given this likelihood, the writ should be dismised as improvidently granted.[12/]

12/ In its remand order, the Court of Appeals below said

> § 1927 provides only for excess costs caused by the plaintiffs' attorneys' vexatious behavior and consequent multiplication of the proceedings, and not for the total costs of the litigation.

599 F.2d at 1382.

Moreover, the dismissal would be, given the nature of the remand by the Court of Appeals, consistent with this Court's policy of not reviewing nonfinal appellate decisions. See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R., 389 U.S 327 (1967); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S 251, 258 (1916).

If the Court does not dismiss the writ, then it should affirm the judgment of the Court of Appeals remanding the case for an evidentiary hearing on the question whether excess costs were incurred and whether there was a multiplication of proceedings caused by respondents' attorneys' vexatious acts. To the extent, however, that the judgment of the Court of Appeals permits the district court to find that excess costs were created as a result of respondent McPherson's failure to attend his noticed depositions, the judgment should be reversed since no evidence was ever offered showing that any such excess costs, or concomitant multiplication of proceedings, were caused by acts of respondents' attorneys. See Thompson v. Louisville, supra.

II. ATTORNEY'S FEES ARE NOT ALLOWABLE AS ELEMENTS OF COSTS UNDER § 1927

If this Court decides the issue for which it granted certiorari, then the judgment of the Court of Appeals must, on that issue, be affirmed. For the reasons indicated by the Fifth Circuit, attorney's fees are not recoverable under § 1927.[13/] As the Fifth Circuit implicitly recognized, the scope of the meaning of the term "costs" appearing in § 1927 is neither enlarged nor restricted by the types of costs allowable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e-5(k) and under the Civil Rights Attorney's

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13/ No one seriously doubts that, at the time the statute was enacted, it was not contemplated that an award of excess costs under it would include attorney's fees. Clearly the meaning of the term "costs" was limited to what are commonly referred to as taxable costs. 1507 Corporation v. Henderson, 447 F.2d 540, 542 (7th Cir. 1971); United States v. Ross, 535 F.2d 346, 350 (6th Cir. 1976). This has been interpreted correctly to require only inclusion of items of "regular costs" as elements of excess costs under § 1927. 1507 Corporation v. Henderson, supra, 447 F.2d at 542. Accord: Kiefel v. Las Vegas Hacienda, Inc., supra, 404 F.2d at 1166, 1170. Since attorney's fees are not items of regular costs under federal costs

Fees Award Act of 1976, 42 U.S.C. § 1988.[14/] No justification exists for believing that the meaning and application of § 1927 should vary

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13/ cont'd

statutes, they have been properly excluded from consideration as items of costs under § 1927. 1507 Corporation v. Henderson, supra, 447 F.2d at 542-43; Kiefel v. Las Vegas Hacienda, Inc., supra, 404 F.2d at 1170.

This conclusion is the only one which is consistent with this Court's decisions in Alyeska Pipeline Serv. v. Wilderness Society, 421 U.S 240 (1975) and Christiansburg Garment Co. v. EEOC, supra. To the extent that contrary decisions have been reached in other cases, they have been reached without analysis of the underlying issues. See e.g., Browning Debenture Holders' Committee v. DASA Corp., supra.

14/ The purposes behind the civil rights statutes and § 1927 are different. The latter is a penal statue, United States v. Ross, supra, 535 F.2d at 350, whereas the civil rights statutes are remedial. See Newman v. Piggie Park Enterprises, 390 U.S 400, 402 (1968); Prandine v. National Tea Co., 585 F.2d 47, 53 (3rd Cir. 1978); Parker v. Califano, 561 F.2d 320, 330-331 (D.C. Cir. 1977). Morever, § 1927, unlike the civil rights statutes, is only concerned with multiplication of proceedings. By contrast, the civil rights statute are, unlike § 1927, only concerned with compensating prevailing parties and with deterring groundless actions.

according to whether the action is commenced under a civil rights statutes or is commenced pursuant to another federal provision.

Moreover, allowance of such a variance in the meaning of the statute would produce an anamoly. It would mean, for example, that the United States would not be able, in a Title VII action, to obtain attorney's fees, as part of its excess costs under § 1927, against a defendant's attorney who committed vexatious acts, no matter how much those acts may have multiplied the proceedings and caused the United States to incur excess costs. This result follows from the fact that Title VII does not authorize the United States to recover attorney's fees. See 42 U.S.C. § 2000e-5(k). Yet, defendant would be permitted to recover, in the reverse situation, attorney's fees as excess costs against attorneys for the United States. This, however, would be an absurdity that would make a mockery of the purposes of § 1927. Thus, the term "costs", as it appears in § 1927, must be interpreted uniformly and made equally applicable to all actions.

Even if this Court were to hold that attorney's fees are recoverable under § 1927, it would not follow therefrom that such fees are automatically to be awarded everytime excess costs are taxed under § 1927. The question of whether attorney's fees should be imposed in a particular case is a separate question from whether regular items of costs, including excess costs, should be imposed in the case. The allowability of attorney's fees is governed by standards that are altogether different from those governing assessment of costs under, for example, 28 U.S.C. § 1920. See e.g., Newman v. Piggie Park Enterprises, supra; Hughes v. Repko, 578 F.2d 483 (3rd Cir. 1978); Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3rd Cir. 1973). Thus, any reversal of the Fifth Circuit's judgment must include a remand permitting that court an opportunity to fashion standards for the award of attorney's fees under § 1927 and permitting that court, as well as the district court, to determine whether respondents' attorneys' conduct has been,

in light of all of the circumstances, such as to justify the assessment of attorney's fees against them. Moreover, such a remand may be necessary, in any event, to determine whether the judgment of the Fifth Circuit below constituted a finding that respondents' attorneys' conduct was not so vexatious and unreasonable as to require, in this instance, an assessment of attorney's fees against them and in favor of petitioner.

CONCLUSION

For the reasons stated above, this Court should dismiss the writ as improvidently granted, or, in the alternative, to either affirm the judgment below or remand the action for proceedings consistent with principles set forth herein.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-701

ROADWAY EXPRESS, INC.,
Petitioner

v.

J. D. MONK, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S OBJECTIONS TO THE MOTION OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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BACKGROUND

On March 25, 1980, counsel for Roadway was timely served with a motion for leave to file a brief *amicus curiae* submitted by the NAACP Legal Defense and Educational

Fund, Inc., in support of the respondents.[1] Roadway respectfully submits its objections to the Legal Defense Fund's request.

THE OBJECTIONS

I. OBJECTION NO. 1: WHETHER THE THREE ATTORNEYS ENGAGED IN CONDUCT WHICH SUBJECTED THEM TO AN ASSESSMENT OF COSTS UNDER SECTION 1927 IS NOT PROPERLY BEFORE THE COURT.

The rationale of the Legal Defense Fund's primary argument is foreclosed by the respondents' failure timely to file a cross-petition for a writ of certiorari. Consequently, such portions of the Legal Defense Fund's brief which advance arguments foreclosed from presentation in this Court by the respondents, are irrelevant to the disposition of this case, and barred from consideration under Rule 42(3) of this Court relating to briefs *amicus curiae*.

The Legal Defense Fund's primary argument is that "[t]he writ of certiorari should be dismissed as improvidently granted," *LDF Brief* at 3, the rationale of the argument being that "both the Court of Appeals and the district court below erroneously assumed that § 1927 was

[1] The Legal Defense Fund's brief is hereinafter cited as "*LDF Brief.*" Although not specifically mentioned in its brief, Legal Defense Fund attorneys appear as counsel of record for attorneys assessed with attorneys' fees under § 1927 in a case pending in the United States Court of Appeals for the Fourth Circuit. Wheeler v. Anchor Continental, Inc., 20 Fair Empl. Prac. Cas. 591 (D.S.C. 1978), *appeal docketed*, No. 79-1116 (4th Cir. Feb. 14, 1979).

applicable to the facts presented here." *Id.*[2] This rationale, however, was vigorously argued by the respondents in the court of appeals,[3] categorically rejected by that court,[4] and thus foreclosed from argument in this case by the respondents' failure to timely seek review of that portion of the court of appeals' judgment in this Court. *E.g.*, *NLRB* v. *International Van Lines*, 409 U.S. 48, 52 n.4 (1972); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 381 n.4 (1970). Precluding such arguments is particularly appropriate where, as in the instant case, the argument seeks to bring before the Court, without the filing of a cross-petition, findings of fact heretofore deemed settled. *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

[2] Roadway refers to the argument as the Legal Defense Fund's "primary argument" for the simple reason that thirteen of the brief's twenty-four pages are devoted to discussion of the rationale for the argument. *LDF Brief* at 5-18.

[3] For example, the subject was exhaustively argued at pages 16 through 24 of the respondents' "Original Brief on behalf of Defendants-in-Rule-Appellants" submitted to the court of appeals.

[4] The court of appeals' decision reads:

> Looking first to the propriety of entering any award at all against the appellants under § 1927, we find that the district court's determinations regarding the vexatiousness of the appellants' behavior are not clearly erroneous. . . . The instances of misconduct related in the district court's ruling on the motion to assess costs and attorneys' fees adequately support the court's findings of fact concerning the vexatious manner in which the appellants conducted the lawsuit. thus, *under § 1927, the appellants are subject to personal liability for the excess costs generated by their unreasonable and vexatious multiplication of the proceedings.* Having determined that the *appellants are liable for an award under § 1927*, we turn to the proper scope of their liability.

Pet. App. A, at 4a-5a (emphasis added) (citations omitted).

Reviewing *International Van Lines*, *Mills* and other decisions of this Court on the subject, one source summarizes the holdings as follows:

> In each of those cases the party who had prevailed below was barred from presenting an argument which would have supported the judgment in his favor because its logic would have led to the entry of a judgment which went further in his direction.

R. Stern & E. Gressman, *Supreme Court Practice* 480 (5th ed. 1978). Applying such holdings to the instant case, it is manifest that, had the court of appeals accepted the respondents' arguments that the conduct in issue was not of such a nature that the attorneys were subject to an assessment of "costs" under section 1927, the judgment of the court below would have been extended further in the attorneys' "direction."[5] Thus, in the absence of a cross-petition, presentation of arguments concerning whether the attorneys were subject to an assessment of "costs" pursuant to section 1927 is barred. The only issue properly before the Court is whether such an assessment may include attorneys' fees.

II. OBJECTION NO. 2: THE COURT OF APPEALS' DECISION ON THE ISSUE OF WHETHER ATTORNEYS' FEES ARE INCLUDABLE AS "COSTS" UNDER SECTION 1927 IS CLEARLY FINAL.

There is no basis for the Legal Defense Fund's characterization of the court of appeals' remand as being "to determine what, if any, excess costs were caused by the respondents' attorneys' unreasonable and vexatious acts

[5] Indeed, had the court of appeals decided the conduct issue favorably to the respondents, the question presented by Roadway's petition—the naked statutory issue of whether attorneys' fees may be included in an assessment of "costs" under § 1927—probably would not have been reached by the court.

or by any multiplication of the proceedings by them." *LDF Brief* at 3-4. The remand, simply and accurately stated, was for the sole purpose of removing attorneys' fees from the district court's judgment.[6]

Furthermore, from a practical standpoint, even if the remand could be construed to require a redetermination by the district court of what is and what is not an "excess" cost, the district court must first know, as a matter of law, what is and what is not a "cost" which may be "excess." This initial determination as to what is a "cost" is precisely the question presented by Roadway's petition,[7] a question which the Legal Defense Fund admits was decided adversely to Roadway. *LDF Brief* at 16. Thus, even assuming *arguendo* that the remand encompassed a requirement that the district court redetermine which portions of the costs are "excess costs," Roadway is clearly entitled to seek review of the legal standard[8] applied by

[6] The Legal Defense Fund's reliance on dicta from the court of appeals' opinion, *LDF Brief* at 18 n.12, overlooks the fact that "[t]his Court . . . reviews judgments, not statements in opinions." Black v. Cutters Laboratories, 351 U.S. 292, 297 (1956).

[7] Whether attorneys who unreasonably and vexatiously multiplied proceedings in an action under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 may be personally assessed, pursuant to 28 U.S.C. § 1927, with attorneys' fees as part of the "excess costs" incurred by an opposing party as a result of such conduct?

Pet. for Cert. at 2.

[8] In Malat v. Riddell, 383 U.S. 569 (1966), this Court was, as in the instant case, requested to construe one operative word of a statute which controlled the "legal standard" governing overall application of the provision to the facts of the case.

> Since the courts below applied an incorrect legal standard, we do not consider whether the result would be supportable on the facts of this case had the correct one been applied. We believe, moreover, that the appropriate disposition is to remand the case to the District Court, for fresh fact-findings, addressed to the statute as we have now construed it.

Id. at 572.

the court of appeals in holding that attorneys' fees are not "costs" includable in a determination of "excess costs" under section 1927.[9] In any event, since the Legal Defense Fund's theory of "nonfinality" presumes acceptance of arguments which are not properly before the Court because of the respondents' failure to file a cross-petition, *i.e.* that the three attorneys' conduct was not proscribed by section 1927, *e.g.*, *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 226 n.2 (1975), that theory, and thus that portion of the Legal Defense Fund's brief advancing the theory, is irrelevant to the disposition of this case.

[9] As stated by the court of appeals: "Our construction of § 1927 does not foreclose assessment of attorneys' fees against attorneys in every conceivable situation, *it merely forecloses the imposition of such liability under § 1927.*" Pet. App. A, at 7a (emphasis added).

CONCLUSION

In light of the Legal Defense Fund's primary interest in advancing arguments not properly before the Court,[10] Roadway submits that the motion for leave to file brief *amicus curiae* should be denied. Alternatively, Roadway submits that the Legal Defense Fund's motion should be granted only insofar as the brief submitted advances arguments properly before the Court.

Respectfully submitted,

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[10] That limited portion of the Legal Defense Fund's brief which does not advance such arguments, *LDF Brief* at 20-23, simply recites the holdings and authorities relied upon by the court of appeals, and adds little, if anything, to this case different from the arguments advanced by the respondents in their brief.